Supreme Court, U.S.
FILED

09-383 SEP 28 2009

No.

OFFICE OF THE CLERK

In The
Supreme Court of the United States

PARK MINI STORAGE CENTER COMPANY,

Petitioner,

v.

SAM'S EAST, INC. D/B/A
SAM'S CLUB,

Respondent.

Petition For A Writ Of Certiorari
To The District Court of Appeal,
Second District, State of Florida

PETITION FOR A WRIT OF CERTIORARI

Karen E. Maller, Esq.
(*Counsel of Record*)
Powell Carney Maller Ramsay &
Grove, P.A.
One Progress Plaza, Suite 1210
St. Petersburg, FL 33701
(727) 898-9011
Counsel for Petitioner

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTIONS PRESENTED

1. Whether there has been a denial of the fundamental constitutional right under the Fifth Amendment of the United States Constitution and Article 1 of the Constitution of the State of Florida, which prohibit the taking of property without due process of law as a result of the District Court of Appeal, Second District, State of Florida, denying the Petitioner the right to a trial to determine the taking of Petitioner's property.

2. Whether there has been a denial of the fundamental constitutional right to be heard under the Fourteenth Amendment of the United States Constitution as a result of the District Court of Appeal, Second District, State of Florida, denying the Petitioner the right to a trial of well-pled claims which have never been decided by a trier of fact?

3. Whether there has been a denial of the fundamental constitutional right to the access of courts under the Fourteenth Amendment of the United States Constitution as a result of the District Court of Appeal, Second District, State of Florida, denying the Petitioner the right to a trial of well-pled claims which have never been decided by a trier of fact?

LIST OF PARTIES

The parties are: the Petitioner, Park Mini Storage Center Company, who was the plaintiff in the state trial court and appellant on review before the state appellate court; and the Respondent, Sam's East, Inc. d/b/a Sam's Club, who was the defendant in the state trial court and appellee on review before the state appellate court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES x

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

- I. HISTORY OF THE PROPERTY 5
- II. LACK OF MAINTENANCE RESULTS IN LACK OF PERFORMANCE OF DRAINAGE SYSTEM 7
- III. HISTORY OF THE STATE ACTION 10
- IV. PERTINENT TESTIMONY SUPPORTING ALLEGATIONS OF THE FIRST AMENDED COMPLAINT 11

V. JURISDICTION PROPERLY LIES WITH THIS COURT 25

REASONS FOR GRANTING THE WRIT............ 26

I. TAKING OF PROPERTY WITHOUT DUE PROCESS. 27

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT OF LEGAL PRINCIPLES RAISED BY THE OPINION OF THE STATE DISTRICT COURT, AND OTHER STATE COURT DECISIONS WHICH HAVE INTERPRETED THE APPLICATION OF THE RIGHT OF ACCESS TO THE COURTS AND THE OPPORTUNITY TO BE HEARD. 30

A. *Denial of the Opportunity to be Heard on Well Pled Allegations Resulting in a Disposal of the Claims arising out of the tortious action of Sam's Club* 30

B. *Denial of the Fundamental Constitutionally Protected Right of Access to the Courts* 30

III. THE ISSUES PRESENTED HEREIN ARE OF FUNDAMENTAL IMPORTANCE 31

IV. THE DECISION OF THE STATE DISTRICT COURT IS CONSTITUTIONALLY ERRONEOUS 32

A. *Limitations on the trial court when presented with Summary Judgment*..... 33

B. *Limitations of the exclusion of expert testimony.* 38

CONCLUSION 43

APPENDIX

APPENDIX A

Order of District Court of Appeal, Second District, State of Florida dated July 1, 2009........A-1

APPENDIX B

Motion for Rehearing, Rehearing En Banc, And Request for Written Opinion A-3

APPENDIX C

Opinion of the District Court of Appeal, Second District, State of Florida dated April 24, 2009...A-16

APPENDIX D

Final Judgment for Defendant, Sam's East, Inc. Dated June 18, 2008 ....A-18

APPENDIX E

Order Granting Sam's Club's Motion for Final Summary Judgment A-20

APPENDIX F

Order Granting Sam's Club's Motion to Strike Expert Witness Report of James E. Rothrock, P.E. A-23

APPENDIX G

Order Granting Sam's Club's Motion in Limine to Exclude Speculative Testimony of Plaintiff Structural Expert, Robert J. Reinhart A-27

APPENDIX H

Order Granting Sam's Club's Motion in Limine to Exclude Undisclosed Expert Opinion Testimony A-29

APPENDIX I

Order Granting Sam's Club's Motion in Limine To Exclude Inadmissible Subsequent Remedial Measure Evidence A-31

APPENDIX J

Order Granting Sam's Club's Motion in Limine To Preclude Park Mini's Experts from Offering Any Testimony About Maintenance of Sam's Club's Drainage Swale A-33

APPENDIX K

Order Granting Sam's Club's Motion in Limine To Exclude Opinion Testimony of Adel Blassy ..A-35

APPENDIX L

Excerpts of the Report from Windermere Properties and Engineering Services, Inc., James E. Rothrock P.E. A-37

APPENDIX M

Excerpts of Testimony of Robert Reinhart 8/25/2006 ....A-67

APPENDIX N

Excerpts of Testimony of Sam's Club's Representative, B. J. Hicks A-72

APPENDIX O

Excerpts of Testimony of Adel Blassy 3/31/2006 ....A-78

APPENDIX P

Excerpts of Testimony of Robert Reinhart 3/14/2006 ....A-84

APPENDIX Q

Excerpts of Testimony of Park Mini's Representative, Elizabeth Nash A-89

APPENDIX R

Excerpts of Written Report of Expert Robert J. Reinhart, P.E A-96

APPENDIX S

Excerpts of Written Report of Expert, Adel Blassy, G.E. A-114

APPENDIX T

Excerpts of Testimony of Adel Blassy, 3/22/2005 ....A-122

APPENDIX U

Excerpts of Testimony of Adel Blassy 3/22/2005 ....A-137

APPENDIX V

First Amended Complaint for Damages A-141

APPENDIX W

Excerpt of Written Report of Sam's Club's Representative Engineer, Michael D. Harding....A-152

TABLE OF AUTHORITIES

Cases **Pages**

5G's Car Sales, Inc. v. Florida Department of Law Enforcement,
581 So.2d 212 (Fla. 3d DCA 1991)........................ 34

Adickes v. S.H. Kress & Co.,
398 U.S. 144 (1970).. 33

Aguila-Rojas v. City Management Group Corp.,
606 So.2d 765 (Fla. 3d DCA 1992)........................ 40

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986).. 33, 34

Barth v. Khubani, 748 So.2d 260 (Fla. 1999)........ 41

Bialkowicz v. Pan Am. Condominium No. 3, Inc.,
215 So.2d 767 (Fla. 3d DCA 1968)........................ 28

Bunyak v. Clyde J. Yancey and Sons Dairy, Inc.,
438 So.2d 891 (Fla. 2d DCA 1983)........................ 28

Celotex Corp. v. Catrett, 477 U.S. 317 34

Chambers v. Baltimore and Ohio Railroad Co.,
207 U.S. 142 (1907).. 31

City of West Palm Beach v. Pittman,
62 So.2d 27 (Fla. 1952)... 28

Davis v. Pfund,
479 So.2d 230 (Fla. 3d DCA 1985)........................ 40

Delgardo v. Allstate Insurance Company,
731 So.2d 11 (Fla. 4th DCA 1991)........................ 39

Diamond National Corporation v. State Board of Equalization,
425 U.S. 268 (1976)... 25

Dock & Marine Const. Corp. v. Parrino,
211 So.2d 57 (Fla. 3d DCA 1968)......................... 28

Hinton v. Gold,
813 So.2d 1057 (Fla. 4th DCA 2002)..................... 29

Holl v. Talcott, 191 So.2d 40 (Fla. 1966)............... 34

Hooks v. Wainwright,
352 F Supp. 163 (M.D. Fla. 1972)......................... 31

In re Kloster, 526 So.2d 196 (Fla. 3d DCA 1988).. 41

John K. Brennan Co. v. Central Bank & Trust Co.,
164 So.2d 525 (Fla. 2d DCA 1964)....................... 35

Joint Anti-Fascist Refugee Comm. v. McGrath,
341 U.S. (1951)... 30

Keller Indus. v. Volk,
657 So.2d 1200 (Fla. 4th DCA 1995)..................... 40

Koger Properties, Inc. v. Allen,
314 So.2d 792 (Fla. 1st DCA 1975) 29

LoBue v. Travelers Insurance Company,
388 So.2d 1349 (Fla. 4th DCA 1980) 39, 41

McClowsky v. Martin, 56 So.2d 916 (Fla. 1951).... 28

Montana v. Egelhoff, 518 U.S. 37 (1996)............... 39

Nash v. Florida Industrial Commission,
389 U.S. 235 (1967) 25

New Homes of Pensacola, Inc. v. Mayne,
169 So.2d 345 (Fla. 2d DCA 1984)........................ 28

Pascual v. Dozier,
771 So.2d 552 (Fla. 3d DCA 2000)........................ 40

Santos Wrestling Enterp., Inc. v. Perez,
367 So.2d 685 (Fla. 3d DCA 1979)........................ 41

Slaughter House Cases, 83 U.S. 36,
1872 WL 15386 (U.S. La.),
21 L. Ed 394 (1872) 27

Stuart Agency, Inc. v. Lesueur,
785 So.2d 1242 (Fla. 4th DCA 2001) 39

Van Dusen v. Dobson,
457 So.2d 1062 (Fla. 2d DCA 1984)...................... 28

Visingardi v. Tirone, 193 So.2d 601 (Fla. 1966) ... 35

Wolff v. McDonnell, 418 U.S. 539 (1974)............... 31

Constitution of the United States

U.S. Constitution, Amendment V......... i, 2, 25,27,30
U.S. Constitution, Amendment XIV......... i, 2, 40, 41

Constitution of the State of Florida

Florida State Constitution, Article I, Section 2 3
Florida State Constitution, Article I, Section 9 4

Statutes

28 U.S.C. §1257 2

Rules

Rule 16.1, Rules of Supreme Court of the United States 27

Rule 9.210, Florida Rules of Appellate Procedure.. 34

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Park Mini Storage Center Company, respectfully requests that a writ of certiorari be issued to review the judgment of the District Court of Appeal, Second District, State of Florida, entered on April 24, 2009, and the Order by the same court denying Petitioner's Motion for Rehearing, Rehearing En Banc, and Request for Written Opinion, entered on July 1, 2009.

OPINIONS BELOW

The April 24, 2009 opinion of the District Court of Appeal, Second District, State of Florida, and the Denial of the Motion for Rehearing, Rehearing En Banc, and Request for Written Opinion entered on July 1, 2009, are the decisions herein sought to be reviewed which are unreported. (A-1, A-16) The prior judgment and earlier decisions of the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida, Circuit Civil No. 05-001123-CI-13, should also be reversed. (A-18, A-20 – A-35)

JURISDICTION

The District Court of Appeal, Second District, State of Florida, entered its decision on April 24, 2009. (A-16) Thereafter, Petitioner filed a Motion for Rehearing, Rehearing En Banc and Request for

Written Opinion with the District Court of Appeal, Second District which was denied on July 1, 2009. (A-1, A-3) Jurisdiction of the Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following Constitutional Provisions. The Fifth Amendment and section one of the Fourteenth Amendment to the Constitution of the United States, which provide:

> No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> • • •
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

> of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Constitution of the State of Florida contains similar prohibitions against the taking of property. Section 2 of Article 1 of the Florida Constitution and Section 9 of Article 1 of the Florida Constitution are as follows:

> **Section 2. Basic rights** - All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of

> race, religion, national origin, or physical disability.
>
> * * *
>
> **Section 9. Due process** - No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

STATEMENT OF THE CASE

The original suit was brought by Petitioner, Park Mini Storage Center Company (hereinafter referred to as "Park Mini"), for damage that occurred to Park Mini's property as a result of the unreasonable use of the neighboring property owned by Respondent, Sam's East, Inc. d/b/a Sam's Club (hereinafter referred to as "Sam's Club"). The suit was brought on the legal theories of negligence and nuisance as alleged in the First Amended Complaint for Damages. (A-141) Because of the unreasonable use of its property, Sam's Club has damaged at least two (2) buildings on the property of Park Mini. The unreasonable use is directly associated with Sam's Club's drainage system, which includes a swale that runs along the property line of the subject properties. Sam's Club negatively impacted the ground water in the immediately surrounding area resulting in the pressure of the ground water causing physical damage to two (2) of the self-service storage buildings of Park Mini immediately adjacent to the property belonging to Sam's Club.

I. HISTORY OF THE PROPERTY

Park Mini is a family owned business consisting of eight (8) separate storage buildings as well as an office building. The structures were built in 1979-1980 and opened for business in 1980. Each storage building has individual units which are rented to the public. (A-141) There are a number of buildings all consisting of just one story. The Sam's Club is a division of Wal-Mart Stores, Inc. Sam's Club history in this Country is through its association with Wal-Mart. The effects that this large discount retail chain has had on local communities has been questionable. Wal-Mart began by opening stores in Arkansas and still maintains it corporate headquarters in the State of Arkansas. By the early 1980s Wal-Mart moved into the southeastern market of the United States. The first Sam's Club store which is Wal-Mart's membership-based discount warehouse club opened in 1983. Sam's Club chain, named for Mr. Sam Walton founder of Wal-Mart, has stores in 48 States of this Country. These stores are intentionally designed as warehouses by Wal-Mart and ordinarily designed to cover approximately 110,000 to 130,000 square feet, without taking into consideration the parking lot. The parking lot itself can be two to three times the size of the store itself. Despite the enormous size of these stores, the Sam's Club division of Wal-Mart refuses to take full responsibility for the damage caused to the neighboring property in this instance.

Prior to Sam's Club purchasing the property to the west of Park Mini, there was little or no pavement on this adjacent property. (A-45) It remained that way until Sam's Club came into the area and built its standard facility, covering almost the entire neighboring property with concrete and/or asphalt. Sam's Club substantially changed the characteristics of the storm water infiltration in the area following construction. (A-47 - A-49) In the pre-development era, infiltration was to be largely uniform across the property. (A-46) Following the post-development by Sam's Club, infiltration was concentrated in the ponds and open channels in which storm water collected. (A-46) As part of the drainage system implemented by Sam's Club, a swale was located immediately adjacent to Park Mini. The swale as well as the ponds were filled with significant quantities of sediment, which in turn reduced their size and efficiency. (A-46) As a result of Sam's Club's failure to properly maintain the drainage system thereby resulting in the "build up" of sediment, two buildings on Park Mini's property have been damaged. This is clearly at least in part a maintenance issue that was not being addressed by Sam's Club.

II. LACK OF MAINTANCE RESULTS IN LACK OF PERFORMANCE OF DRAINAGE SYSTEM

In the latter part of 2001 and into 2002, Park Mini, first learned of water intrusion affecting the building adjacent to Sam's Club's property. Upon learning of the water intrusion into some of the units of Park Mini's buildings, Park Mini began to investigate. (A-16, A-89) Upon a review of the storage units, it became clear to Park Mini that the water was not coming from the roof because the personal items of the renters inside the units of the building adjacent to Sam's Club's property were wet on the bottom but not the items on the top. (A-89) Park Mini closed down the buildings adjacent to Sam's Club because it could not continue to rent these units knowing that at least some of the units had water coming up from the bottom and through the foundation, which was damaging the items sitting on the floor of the units. In 2003, Park Mini became aware of the enormous amount of water that was accumulating in the swale immediately adjacent to its buildings. Park Mini did attempt to contact Sam's Club through Wal-Mart's corporate headquarters in Arkansas. After sending correspondences and following up with numerous telephone calls, the representative from Sam's Club at the corporate Wal-Mart office finally sent an engineer, Michael D. Harding, P.E., out to look at the property and investigate the swale. The visit by Mr. Harding of Mactec Engineering took place on September 15, 2003. (A-152) Mr. Harding thereafter submitted a written report dated

November 10, 2003. (A-152). Mr. Harding addressed his report to Ms. B.J. Hicks as the Representative of Sam's Club. Mr. Harding acknowledged in his report that the units that he saw in the building immediately adjacent to Sam's Club "...all had water or evidence of water seeping in..." and "(t)here were no visible signs of water coming through the roofs, except in one of the units." (A-152) Mr. Harding also noted that the "floor slabs of each of these units are at or about the same elevation of ground on the west side of the building, which is coincident with the east property line of Sam's Club." (A-152) Lastly, Mr. Harding also acknowledged that there was standing water observed in the swale on Sam's Club's property and along the bottom of the block wall of the back of the storage units. (A-152) Mr. Harding concluded that in his "...opinion...the problem is a ground water problem." (A-152). Following receipt of this report, Sam's Club did not continue to use Mr. Harding's services in this matter.

Following Mr. Harding's site visit, little or no further communication took place on the part of Sam's Club with Park Mini. Therefore, Park Mini then retained the services of Mr. Blassy, a hydrogeologist, in February of 2004. Mr. Blassy is a professional geologist licensed with the State of Florida since 1995. He has worked as a hydrogeologist for over 30 years. (A-122) He has spent years studying groundwater and how it affects various structures. (A-122) Mr. Blassy has taken all of the course work for a Ph.D. in hydrogeology and engineering geology and all that he is lacking in order to obtain his Ph.D. is to defend his dissertation. (A-122) Mr. Blassy had worked for the State University of New York as a professor teaching hydrogeology. (A-122) Mr. Blassy further testified that his opinions are based on his field experience which includes having done thousands of reports addressing the behavior of groundwater. (A-122)

Mr. Adel Blassy performed a field investigation as well as an interview with the representatives of Park Mini. Mr. Blassy's work entailed installing ten (10) piezometers on the property of Park Mini. Mr. Blassy continued to monitor the groundwater levels from May of 2004 through 2006. Pursuant to the initial work performed by Mr. Blassy, he recommended to Sam's Club that a re-grading of the swale needed to be performed to alleviate the groundwater pressure which was in turn causing damage to the buildings identified as M and N of Park Mini. (A-114) Following the communications with Mr. Blassy, Sam's Club did implement what has been referred to as the grading and erosion control plan. The grading and erosion plan has been described as a maintenance issue by the representatives of Sam's Club. (A-72) Mr. Blassy continued to monitor the wells. Following the maintenance of the swale by Sam's Club, the groundwater level was reduced but the damage to the buildings belonging to Park Mini had already been done. Despite the permanent damage to the structures belonging to Park Mini, Sam's Club refused to be accountable. As a result of Sam's Club's refusal to resolve the destruction of the storage buildings belonging to Park Mini, the civil action was filed in the state court of Florida.

III. HISTORY OF THE STATE ACTION

During the trial court action, Sam's Club filed a number of motions to exclude testimony and evidence from the jury as well as the Motion for Summary Judgment. Those orders included the following:

> Order Granting Sam's Club's Motion in Limine to Exclude Speculative Testimony of Plaintiff's Structural Engineer, Robert J. Reinhart (A-27);
>
> Order Granting Sam's Club's Motion in Limine to Exclude Undisclosed Expert Opinion Testimony (A-29);
>
> Order Granting Sam's Club's Motion to Strike Witness Report of James E. Rothrock, P.E. (A-23);
>
> Order Granting Sam's Club's Motion in Limine to Exclude Inadmissible Subsequent Remedial Measure Evidence (A-31);

> Order Granting Sam's Club's Motion in Limine to Preclude Park Mini's Experts from Offering Any Testimony About Maintenance of Sam's Club's Drainage Swale (A-33);
>
> Order Granting Defendant's Motion in Limine to Exclude Opinion Testimony of Adel Blassy (A-35); and
>
> Order Granting Sam's Club's Motion for Final Summary Judgment (A-20).

The trial court erroneously granted the Motions of Sam's Club in violation of Park Mini's constitutional rights resulting in an improper taking of Park Mini's property and the erroneous entry of these orders by the trial court and refusal by the state appellate court to reverse the entry of the orders entered by the trial court, prohibiting Park Mini from its constitutional right to access to the court and to be heard. Park Mini sought relief through the state appellate court. The state appellate court entered the "per curiam affirmed" decision without providing any written opinion. (A-14) Thereafter Park Mini requested that the state appellate court review this decision and at the very least provide a written opinion. The state appellate court refused to do so. (A-16)

IV. PERTINENT TESTIMONY SUPPORTING ALLEGATIONS OF THE FIRST AMENDED COMPLAINT

The First Amended Complaint includes two (2) counts, a count for negligence and a count for nuisance. (A-144) The pertinent allegations included in the First Amended Complaint are the following:

> 6. The Plaintiff began to experience excessive water damage to its storage facility, and could not determine the cause.
>
> 7. Plaintiff retained an expert to investigate the water damage issue to determine the cause of the water intrusion which has caused extensive damage to Plaintiff's storage facility.
>
> 8. The initial investigation completed in June of 2004, has confirmed that the extensive water damage is the result of drainage from the Sam's Club facility owned by Defendant, that has negatively impacted the ground water in the immediately surrounding area, resulting in the pressure of the ground water causing physical damage to the storage facility

belonging to Plaintiff, which is immediately adjacent to the Defendant's property.

9. The Defendant has refused to acknowledge its responsibility for the water damage being caused to the Plaintiff's storage facility. However, in the latter part of 2004, the Defendant took action to correct the drainage.

10. By the time the Defendant ultimately took action to correct the drainage issue on its property adjacent to the Plaintiff's storage facility, extensive physical damage had already been caused to the Plaintiff's storage facility.

• • •

12. It was reasonably foreseeable to the Defendant that its failure to account for the effect of the drainage system on its property would have a negative impact on the surrounding property owners, including Plaintiff's storage facility.

13. The Defendant therefore owed a duty to Plaintiff to see that the drainage system did not adversely

affect the ground water in a manner so as to cause injury to Plaintiff's storage facility.

14. Defendant failed to use due care in that the Defendant has impacted the ground water levels to such an extent that it has negatively impacted Plaintiff's storage facility.

15. As a result of Defendant's actions, excessive and unnecessary quantities of water were diverted to the adjacent property, directly and proximately causing the damage to Plaintiff's storage facility to the extent that a portion of Plaintiff's storage facility must be rebuilt, which has been identified as buildings M and N located closest to the Defendant's property...

19. By the aforesaid actions, Defendant created a condition causing damage to the Plaintiff's property and creating a danger of future damage. In light of the conditions thereby created, Defendant's use of its property cannot be considered lawful or reasonable, but rather constitutes a **nuisance**.

> 20. As a result of this **nuisance**, excessive and unnecessary quantities of water were diverted to the adjacent property, directly and proximately causing the damage to a portion of Plaintiff's storage facility, including buildings identified as M and N of Plaintiff's storage facility located closest to the Defendant's property... (A-141)

The testimony from the witnesses for which Park Mini intended on calling to support the above-stated allegations at trial if given the opportunity to do so, demonstrates that the drainage system on the property of Sam's Club caused damage to the physical buildings of Park Mini. The testimony of the experts retained by Park Mini include Mr. Blassy, previously mentioned, Mr. Rothrock, Mr. Reinhart and Mr. Truex.

Mr. Blassy provided his expert testimony in both a written report and in his deposition testimony that the water intrusion into Park Mini's buildings was a result of the drainage system on Sam's Club's property and specifically the swale. Mr. Blassy testified that there is an impact from the Swale. There was a noticeable drop in the level of the water table when there should have been actually a higher reading because of the season when the surveys were being taken. Mr. Blassy went on to explain that the rise of the water level can have a tremendous impact on the foundations of buildings. When asked about his opinion as to the direct relationship between the Swale and the impact of the groundwater on the abutting property, Mr. Blassy confirmed that he reached that conclusion with the assistance of the data he collected from the wells.

Mr. Blassy testified that:

> . . . I give and render my professional opinion based on the fact that this source of water in the ground water, the Swale is upgradient and it's the recharge and it's the source of contributing to the immediate vicinity of the wells that---- immediate vicinity of the property boundary that caused the water to rise.
>
> And after Sam's Club have corrected and reconfigured this has been reflected in our second report, the January report, that actually there is an impact and we stated it is a positive impact because the figurations that have taken place. (A-137)

When Mr. Blassy was asked for conclusive evidence that the water table was high enough to affect the bottom of the foundation of the buildings M and N, he responded as follows:

A I believe we do have a conclusion as such from our observation combined with our field data. Our field observation, which is basically the crack based—-- the cracks along the base of ---- along the slab, the moisture---- the occurrence of moisture that only occurs along the hair cracks, the other cracks, the spider web cracks, as I pointed those out to you and your client during our site visit as well.

Q -- Okay. And the water that you have, the moisture that was reflected in those -- in and around those cracks, you have no way of determining with any certainty as to where it came from?

A All the observation that we have seen and based on what we have seen in other sites as from experience, that it seems to be due to intrusion from bottom up, from the groundwater.

Q Okay. Are you able to give an opinion within a reasonable hydrological certainty that that water came from the groundwater table rather than from another source?

> A With a relatively high level of confidence, yes. (A-78)
>
> . . .
>
> Q And the only proof that you have that it's impacting it is the differential in the elevation of the groundwater from point and time to point and time. Correct?
>
> A Incorrect. That's beside the fact. The field observation, the observation that we saw at the slab. That impact, it's obvious it's clear that it is coming from the groundwater. (A-78)
>
> . . .
>
> Q If groundwater is below the bottom of the slab, isn't it true that it will not uplift concrete?
>
> A No, it's not true. If it's close enough to the slab, then you have uplifting pressure at the capillary zone. You still have some moisture there that actually can have some impact on the uplift. (A-78)

Mr. Rothrock was retained by Park Mini to further investigate the groundwater intrusion. Mr. Rothrock is a professional engineer specializing in civil and geotechnical engineering studies. Mr. Rothrock examined the properties and specifically the shallow drain swale serving as part of the stormwater management system for the facilities of the adjacent Sam's Club property as well as the performance of the stormwater management system serving Sam's Club. In Mr. Rothrock's report he made the following pertinent findings and conclusions:

. . .

> Along Park Boulevard, we examined Ponds 11 and 13, to compare them to the original design. Both Ponds appeared to be filled with significant quantities of sediment, reducing them significantly from their original size. (A-46)

. . .

> The presence of sedimentation would inhibit infiltration from occurring in the under drain. (A-47)

. . .

> The original design called for a network of pipes providing discharge of the retained water into side bank under drains at the

northern and eastern sides of the pond, discharging downstream of the weir at the discharge structure. Several of these under drains appear to be missing or submerged, even though our examination occurred after a sustained dry period. (A-47)

. . .

When sufficient water accumulates in the system, the design analysis indicates the water reaches an elevation sufficient to flow backward through the system into the swale along the western property boundary of Park Mini Storage. (A-49)

. . .

By a letter ("Project Information Review List") dated March 25, 2004, the Southwest Florida Water Management District noted a Statement of Completion and As-Built drawings never were submitted for the original project. Submittal of these was requested, along with documentation that the surface water management system still functioned as permitted and designed. (A-55)

. . .

Beginning on November 7, 2005, a number of requests were made by the Southwest Florida Water Management District for submittal of an inspection report, assuring the surface water management system is properly operated and maintained. (A-56)

. . .

The pond configurations from the As-Built survey, having reduced storages volumes, result in peak stormwater elevations which are higher that peak stages which formed the basis of the original stormwater permit. (A-58)

. . .

Pond 13 achieves a peak stage of 1.237 feet, an increase of 0.34 feet (4.0-inches) above the peak stage predicted by the permit documents. Since Pond 13 is directly connected to the ditch bottom inlet in the drainage channel along the eastern property boundary (adjacent to Building "N" in Park Mini Storage) accumulated

> stormwater would flow toward the east, discharging from the inlet and filling the swale alongside Building "N". (A-58, A-59)
>
> * * *
>
> The onset of retention sedimentation, and diminished performance of the under drains, appear consistent with the reported progressively more-severe flooding of the Park Mini Storage buildings over a period of several years. (A-65)

In addition to Mr. Rothrock's testimony, Mr. Reinhart provided expert testimony as the structural engineer to support the well pled allegations contained in the First Amended Complaint. (A-141) Robert Reinhart, the structural engineer retained by Park Mini further confirmed that the water that was damaging the storage facility units was the result of ground water coming up through the cracks in the slab of the building. (A-96) Mr. Reinhart testified that there was residue on the floor of the storage facilities. This residue is what is called efflorescence and consists of salts. This is a direct result of the ground water pressure being forced up to the surface. It is physical evidence that has been documented in photographs by Mr. Reinhart. (A-96) Mr. Reinhart also testified about the water staining around the cracks as further evidence of the water that came up through the ground causing the foundation of the storage units to crack.

When Mr. Reinhart was specifically asked whether it was his conclusion that there was water intrusion into building M from the groundwater, he stated yes. (A-84)

When asked about the soil bearing capacity, Mr. Reinhart responded that:

> ...I've got cracking in my wall and I've got water coming up through my foundation, which tells me I've got groundwater underneath my foundations, which tells me my soil-bearing capacity is being reduced. (A-84)

Opposing counsel questioned Mr. Reinhart further in his second deposition on similar issues.

> Q And you don't have any data that would demonstrate to an engineer such as yourself that the water table was ever at a height that it would create hydraulic pressure?
>
> A Well, I've got physical evidence of water coming up through cracks in the floor and efflorescence, which is the water coming up through the slab. So --

> Q Hydraulic pressure doesn't necessarily -- isn't the only explanation for that. Correct?
>
> A Well, water coming up through the slab is the cause for efflorescence on the floor. It's the water migrating from bottom to top. (A-67)

Mr. Reinhart expanded on his professional opinion when asked the following questions:

> Q And, once again, you know, although you see that, you don't have any ability to point to anything for the cause, other than that it's water that you think came up from the ground?
>
> A Water that is coming up from the ground. You have efflorescence. I mean, water is traveling, once again, from the bottom to the top. It's bringing the salt up through the concrete. (A-67)

Mr. Truex is yet another expert identified by PARK MINI that the trial court improperly prohibited from testifying at trial. Mr. Truex, a licensed Class A contractor with the State of Florida, examined building N initially. Thereafter, but prior to his deposition being taken in this action, Mr. Truex revisited the property. Mr. Truex's proposal of January 11, 2006 references the demolition and rebuilding of 89 mini-warehouse units in Pinellas Park, which includes both the units within buildings N and M. Mr. Truex is prepared to testify about the cost of reconstructing buildings M and N.

V. JURISDICTION PROPERLY LIES WITH THIS COURT

28-U.S.C. §1257 permits this Court to review final judgments or decrees rendered by the highest court of a state. "...where any title, right, privilege or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of any commission held or authority exercised under, the United States." Park Mini's right to the use of its property without injury to the property from an abuse of the neighboring owner which abuse has been ignored by the State of Florida, rises to the level of a taking of its property in violation of the Fifth Amendment of the United States Constitution. Moreover, Park Mini's fundamental right of access to the courts and opportunity to be heard on its well pled claims has been foreclosed. This Court has previously held that it will find jurisdiction in a case where federal rights are found to be infringed by a state court decree. See *Diamond National Corporation v. State Board of Equalization* 425 U.S. 268 (1976). Moreover, a decision "...by the highest court of a state in which a decision could be had..." does not mean that the decision must be rendered by the state court of last resort. Park Mini has a "final" decision from the district court as required by 28

U.S.C. §1257. See, *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967). In *Nash*, this Court held a per curiam decision of the Florida District Court of Appeal was the "highest" court in Florida. 389 U.S. at 364-365. No principle of Florida law explains outright dismissal of well pled claims without an evidentiary hearing or the denial of the expert testimony. Park Mini has reached the end of the line in the state judicial system, and so under 28-U.S.C. §1257 this Court has the power to review.

REASONS FOR GRANTING THE WRIT

This case presents stark conflicts with the controlling law allowing for a party to have a right to use its property without harm or damage being caused to such property by a neighboring property owner with the approval of the same by a state court, along with the right to be heard and have well pled claims decided by a trier of fact, after hearing expert testimony. The scope and importance of the ruling in this case is enormous, reaching far beyond the State of Florida. A Writ of Certiorari should be issued to resolve these conflicts and provide further direction to the citizens and courts of this nation. Moreover, the decision below is enormous and the issues it addresses are of utmost importance. This case involves the fundamental rights of a party to have assurances that neighboring property owners are not allowed by governmental action to use its property if such use injures the surrounding neighboring property. It further involves the fundamental rights of a party to be heard by a trier of fact as well as the rights of neighboring property owners. Sam's Club should not be allowed to develop property and thereafter ignore the maintenance of the property to the detriment of its neighbors, while hiding behind the protection of the state court decisions (A-1, A-16, A-18). It is for these reasons that Park Mini requests this Court to grant certiorari and enter an appropriate order disposing of the district court's decisions (A-1, A-16) as well as the Final Judgment entered by the trial court (A-18), under the authority of Rule 16.1, Rules of the Supreme of the United States. The decisions from the Florida state courts are clearly erroneous and are contrary to controlling precedent. Specifically, the relief sought is a Summary Order Granting Certiorari, vacating the judgment, and remanding with instructions to proceed on the merits of the case and for allowing the trier of fact to hear testimony of all of the expert witnesses including those retained by Park Mini.

I. TAKING OF PROPERTY WITHOUT DUE PROCESS

The Fifth Amendment prohibits the taking of property without due process of law. This Court determined very early on ". . . that every person ought so to use his property as not to injure his neighbors. . ." *Slaughter House Cases*, 83 U.S. 36, 1872 WL 15386 (U.S. La.), 21 L. Ed 394(1872). Sam's Club use of its property is injuring Park Mini property. The law in Florida has long held that when considering the rights, duties and liabilities of adjoining landowners, the legal concept of land includes not only the ground or soil, but also that which is attached to the earth, whether it be natural, i.e. water or a product of manufacture, such as buildings. See, Am. Jur. 2d, Adjoining Landowners §1. An adjoining landowner must use the property in such a way that it will not be a nuisance to the other surrounding owners or cause injuries to the adjoining landowner's property. Alternatively the landowner will be answerable to damages for the injury caused to the business of the other owner. *McClowsky v. Martin*, 56 So.2d 916 (Fla. 1951). If one sets about to excavate or improve adjoining land, that party is under a duty to see that such excavation or improvement does not cause damage to the neighboring property. A property owner is allowed to recover for injuries to the buildings caused by negligent excavations performed by the neighboring property. See, *City of West Palm Beach v. Pittman*, 62 So.2d 27 (Fla. 1952). Private property owners have always been held liable for the damages caused to neighboring property arising out of conduct or action taken on its adjoining property. For instance, the courts of Florida have previously determined that an adjoining property owner will be held liable for damages as a result of conducting pile-driving operations causing damage to a building on the adjoining property [*Bialkowicz v. Pan Am. Condominium No. 3, Inc.*, 215 So.2d 767 (Fla. 3d DCA 1968)]; by removing a seawall which causes a canal to collapse onto the neighboring property (*Dock & Marine Const. Corp. v. Parrino*, 211 So.2d 57 (Fla. 3d DCA 1968); or allowing for the overflow of liquid onto the adjoining property [*Bunyak v. Clyde J. Yancey and Sons Dairy, Inc.*, 438 So.2d 891 (Fla. 2d

DCA 1983)]. See also *Van Dusen v. Dobson*, 457 So.2d 1062 (Fla. 2d DCA 1984), *New Homes of Pensacola, Inc. v. Mayne*, 169 So.2d 345 (Fla. 2d DCA 1984), and *Koger Properties, Inc. v. Allen*, 314 So.2d 792 (Fla. 1st DCA 1975) there clearly is a genuine issue of fact as to the liability of SAM'S CLUB to its neighboring property owned by PARK MINI.

The state courts' action, both at the trial court level and the appellate court level has resulted in an improper taking without due process of law. Park Mini has not been provided an opportunity to present its case to demonstrate the taking by Sam's Club which rises to the level of a taking of property in violation of Park Mini's due process rights. Understanding that a prerequisite to the vesting of federal jurisdiction is the deprivation of a right guaranteed by the Constitution, in this instance the state courts' actions denying Park Mini to bring this action before a trier of facts rises to such level to be in violation of Park Mini's Constitutional rights. Further, Park Mini understands that although due process does not guarantee against judicial error, it does require that the fundamental principles of justice shall not be violated and that the decision reached will be done through a fair process. "Fundamental to the concept of due process is the right to be heard which assures a full hearing the right to introduce evidence at a meaningful manner, and judicial findings based upon that evidence." (Citation omitted) *Hinton v. Gold*, 813 So.2d 1057 (Fla. 4th DCA 2002). In this instance, the state courts of Florida are allowing Sam's Club to do as it wishes to its neighbor's property without any accountability for such actions. To allow the state courts to refuse to hear evidence on the harm caused by Sam's Club to Park Mini rises to the level of a taking of property in violation of not only the Fifth Amendment of the United States but also the State Constitution of Florida.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT OF LEGAL PRINCIPLES RAISED BY THE OPINION OF THE STATE DISTRICT COURT, AND OTHER STATE COURT DECISIONS WHICH HAVE INTERPRETED THE APPLICATION OF THE RIGHT OF ACCESS TO THE COURTS AND THE OPPORTUNITY TO BE HEARD.

A. Denial of the Opportunity to be Heard on Well Pled Allegations Resulting in a Disposal of the Claims Arising out of the tortuous action of Sam's Club

The district court's opinion is in direct conflict with the legal principles set forth by this Court along with other federal court decisions which recognize "...the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the sigma and hardships of a criminal conviction, is a principal basic to our society." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951)(Frankfurter, J. concurring).

B. Denial of the Fundamental Constitutionally Protected Right of Access to the Courts

The Constitutional basis for the right of access to the courts is found in the due process clause. See, *Wolff v. McDonnell*, 418 U.S. 539 (1974). This Court has further held that the access to courts "...assures that no person will be denied the opportunity to present the judiciary allegations concerning violations of fundamental Constitutional rights." Id. at 579. The decision of the district court sub judice has completely rejected this Court and other federal court decisions which recognize that there is a fundamental Constitutional right to not only be heard but to be allowed the right to access both the federal and state courts. *Hooks v. Wainwright*, 352 F Supp. 163 (M.D. Fla. 1972). The state district court has refused Park Mini the opportunity to bring an action and to be heard before the trier of fact. The state district court's recent decision along with the trial court's decision is clearly a denial of Park Mini's Constitutional right to access the courts. The trial court made decisions for which the trier of fact should be allowed to decide.

III THE ISSUES PRESENTED HEREIN ARE OF FUNDAMENTAL IMPORTANCE.

The right of the access to courts and the opportunity to be heard is an indispensible right guaranteed by the Constitution. In *Chambers v. Baltimore and Ohio Railroad Co.*, 207 U.S. 142 (1907), this Court characterized the right of access to courts as follows:

> In the decision of the merits of the case there are some fundamental principles which are of controlling affect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship...Equality of treatment in this respect...is granted and protected by the Federal Constitution (Citations omitted)

207 U.S. at 148.

The right to access of courts is not to be treated as a mere formality but requires all courts to provide access that is deemed to be adequate, effective and meaningful. Park Mini should have had the opportunity to present testimony to the trier of fact in order to be provided the access to the courts. Despite the importance this Court has acknowledged lies with the right to the access of courts and the opportunity to be heard, the state courts of Florida wiped out the claims of Park Mini by refusing Park Mini the opportunity to present testimony on the merits of its case to the trier of fact. To uphold the decision of the district court as well as the trial court in Florida is to confirm that we no longer have a true system of justice.

IV. THE DECISION OF THE STATE DISTRICT COURT IS CONSTITUTIONALLY ERRONEOUS.

This Court's interpretation that the right to sue and defend in the courts across this country lies at the heart of an orderly judicial system, has been completely disavowed by the state district court and the trial court. The state courts have taken facts yet to be determined and decided to take well pled facts and allegations away with no legal justification. The state courts cannot purport to have conducted a fact finding mission because this is impermissible. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

A. Limitations on the trial court when presented with Summary Judgment.

In *Anderson* 477 U.S. 242, this Court addressed the limitations on the trial court when presented with a summary judgment. This Court stated that the applicable federal rules addressing a summary judgment

> ... by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed,

> and all justifiable inference are to be drawn in his favor.

Adickes, 398 U.S., at 158-159, 90 S.Ct., at 1608- 1609.

The Florida courts have held that the standard contained in *Anderson, supra* is not as difficult as that which is in place pursuant to the Florida Rule of Civil Procedure 1.510. In *5G's Car Sales, Inc. v. Florida Department of Law Enforcement*, 581 So.2d 212, the Florida appellate court reversed the trial court's entry of a summary judgment finding that the Florida Rules for addressing the standard for the granting of the summary judgment are more strict than the Federal Rule finding that:

> ...in defending the summary judgment, the appellee has attempted to rely upon *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) and their progeny. Although the judgment before us was plainly erroneous under any standard, including *Celotex*, it should be emphasized that, to the extent that they tend to loosen the restrictions on the use of summary judgment, these cases are based upon language in the federal rule, Federal Rule of Civil Procedure 56, which is

> not contained in Florida Rule of Civil Procedure 1.510. [FN1] Hence, *Celotex* and similar cases do not represent the law of Florida on the issue. Our law continues to be that expressed in *Holl v. Talcott*, 191 So.2d at 40; *Visingardi v. Tirone*, 193 So.2d 601 (Fla. 1966) and the numberless cases which follow them.

Moreover in the case of *John K. Brennan Co. v. Central Bank & Trust Co.*, 164 So.2d 525 (Fla. 2d DCA 1964) the Second District Court of Appeal of Florida acknowledged that the party defending or objecting to a Motion for Summary Judgment has certain due process rights that must be recognized:

> Due process requires that before a summary judgment is authorized to be entered against a non-moving party, it must be shown that he has had a full and fair opportunity to meet the proposition that there is no genuine issue of a material fact in that the party for whom the summary judgment is rendered or ordered to be entered is entitled thereto as a matter of law. 6 Moore's Federal Practice, 2nd Ed., Sec. 56.12, p. 2089. This principal governs the trial courts and likewise governs the appellate courts.

164 So.2d 525, 530.

Even without the testimony of the experts, which PARK MINI is not suggesting is the correct path to take in this instance, the overwhelming testimony from the other witnesses demonstrates that a Final Summary Judgment was improperly granted by the trial court. PARK MINI, a family-owned business storage facility, is a small operation in comparison to the other public storage centers that have popped up all over the state in the past several years. Up until the early 1990's PARK MINI was surrounded by what can only be described as grassy areas. It was not until SAM'S CLUB came in and built its concrete structure and pads, that the majority of the neighboring property was paved. The limited space that was not paved by SAM'S CLUB is allegedly being used for the drainage of water. It is the drainage system appearing on the SAM'S CLUB property that has caused the groundwater levels to rise, thereby causing damage to PARK MINI's buildings that abut SAM'S CLUB's property. SAM'S CLUB does not deny that it drastically changed the surrounding property by paving the majority of the area, leaving only limited grassy areas to be used as drainage on its property. The facts of the case also clearly demonstrate that the buildings, those being identified as Buildings N and M, belonging to PARK MINI which abut SAM'S CLUB's property have been physically damaged as evidenced by the numerous cracks throughout these two buildings.

SAM'S CLUB has failed to address the testimony given by several of its witnesses, including

Ms. B.J. Hicks, and the other individuals responsible for regrading the swale, including Trent Stephenson of Kimley-Horne & Associates, who was hired by SAM'S CLUB. The material facts the trial court and the district court chose to ignore include the following:

a. SAM'S CLUB sends Michael D. Harding, P.E., to investigate the swale. Mr. Harding thereafter submits a written report acknowledging that the units had water seeping in, and that there was no visible sign of water coming through the roof of the buildings. (A-152)

b. Ms. Kessler hires Adel Blassy, a hydrogeologist in February of 2004, shortly after SAM'S CLUB released Mr. Harding's report to Ms. Kessler. Mr. Blassy thereafter installs piezometers on the property, which monitor the groundwater elevations. The groundwater elevations are extremely high during the dry season, (A-114)

c. Ms. B. J. Hicks, the representative of SAM'S CLUB, in reviewing the issues raised by both Mr. Blassy and Mr. Harding, acknowledges that the swale had not been regraded within the ordinary five to ten years. (A-72)

d. Kimley-Horne & Associates is retained to further investigate the swale and determines that there is a need for regrading the swale based upon the flat spots that are apparent in the swale. (A-137)

e. Mr. Blassy continues to monitor the piezometers both before and after the regrading of the swale. The monitoring of the groundwater demonstrates that the groundwater table has been affected by the regrading of the swale in that there has been a direct reduction or noticeable drop in the level of the water table.

f. To further investigate the condition of the Buildings, N and M, PARK MINI retained the services of Robert Reinhart, the structural engineer, as well as the certified contractor, Mr. James Truex. Mr. Reinhart confirmed that the efflorescence or soluble salts, which he saw in many of the units, is a result of groundwater coming up through the cracks in the slab of the Buildings. (A-96)

B. Limitations of the exclusion of expert testimony.

Although Park Mini acknowledges that there is no constitutional guaranty to introduce all evidence, this does not allow for the trial judge to prohibit the introduction of evidence that is admissible under the applicable rules of evidence. The due process clause does indeed place certain limits upon the trial court's restriction to the right to introduce evidence as stated by this Court in *Montana v. Egelhoff,* 518 U.S. 37, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996). The state courts of Florida have addressed specifically the exclusion of expert testimony and concluded to do so can rise to the level of a violation of a party's constitutional rights.

The Fourth District Court of Appeal of Florida in *Stuart Agency, Inc. v. Lesueur,* 785 So.2d 1242 (Fla. 4th DCA 2001), held that the exclusion of testimony deprived the party of its constitutional rights. In *Stuart Agency, Inc.*, the court held that:

> The right to present evidence and call witnesses is perhaps the most important due process right of a party litigant." *LoBue v. Travelers Insurance Company,* 388 So.2d 1349, 1351 (Fla. 4th DCA 1980). "Excluding the testimony of a witness is a drastic remedy which should be invoked only under the most compelling circumstances." *Id.; Delgardo v. Allstate Insurance Company,* 731 So.2d 11, 14 (Fla. 4th DCA 1991). "Unless it can be shown that the testimony of a proposed witness will unnecessarily duplicate the subject

> matter of another witness's testimony, the judge should ordinarily allow the party to call the witness.

Id. at 14.

In *Pascual v. Dozier*, 771 So.2d 552 (Fla. 3d DCA 2000) the Third District Court of Appeal of Florida held that the rights provided under the Fourteenth Amendment and specifically the right to call a witness is one of the most important due process rights a party has. The exclusion of such from a trial should be carefully considered and done only under the most extremely sparing circumstances.

> The right to call witnesses is one of the most important due process rights of a party, *see* *Indus. v. Volk*, 657 So.2d 1200, 1202-03 (Fla. 4th DCA 1995); accordingly, the exclusion of the testimony of expert witnesses must be carefully considered and sparingly done. *See, Aguila-Rojas v. City Management Group Corp.*, 606 So.2d 765 (Fla. 3d DCA 1992); *Davis v. Pfund*, 479 So.2d 230 (Fla. 3d DCA 1985). Furthermore, a trial court should exercise caution when the witness sought to be excluded is a party's only witness or one of the party's most important witnesses because if the

> witness is stricken, that party will be left unable to present evidence to support his or her theory of a case. *See Keller Indus.*, 657 So.2d at 1203 (error to exclude proffered expert testimony which was crucial to defense); *LoBue v. Travelers Insurance Company*, 388 So.2d 1349 (Fla. 4th DCA 1980) (error to exclude expert testimony whose testimony was essential to party's case), *disapproved on other grounds, Barth v. Khubani*, 748 So.2d 260 (Fla. 1999); *Santos Wrestling Enterp., Inc. v. Perez*, 367 So.2d 685 (Fla. 3d DCA 1979) (reversible error to exclude defense's essential expert medical witness).

771 So.2d 552, 554.

In re Kloster, 526 So.2d 196 (Fla. 3d DCA 1988), the Florida court again had an opportunity to address the constitutionality of a trial court denying a party's right to call an expert witness. The Third District Court of Appeal of Florida found that the trial court's refusal to hear testimony from two expert witnesses constituted a denial of due process.

In the case at bar, the trial court entered Motions in Limine prohibiting the presentation of testimony from the experts identified by Park Mini. The granting of the Motions in Limine and the refusal to allow for the consideration of such testimony rises to the level of a denial of the constitutional rights provided under the Fourteenth Amendment. To exclude the expert testimony is a harsh remedy that should not have been invoked in this instance as it pertains to all of the experts that were to present testimony on behalf of Park Mini. The trial court has stepped in to the shoes of the trier of fact which is a violation of Park Mini's constitutional rights.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted and the appropriate order be given to summarily dispose of the opinion of the district court in and for the State of Florida on the merits and also the decision of the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida.

Respectfully submitted,

Karen E. Maller, Esq.
Powell Carney Maller
Ramsay & Grove, P.A.
One Progress Plaza,
Suite 1210
St. Petersburg, FL 33701
(727) 898-9011 (Ph)
(727) 898-9014 (Fx)
Counsel for Petitioner

APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327,
LAKELAND, FL 33802-0327

July 1,2009

CASE NO: 2D08-3256

L.T. No. : 05001123CI

Park Mini Storage Center v Sam's East,
Inc. d/*b*/*a*
Company Sam's Club

Appellant / Petitioner(s), Appellee /
Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing, rehearing en banc, and request for written opinion is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Karen E. Mailer, Esq.
Daniel F. Molony, Esq.
Nailah A. Jaifree, Esq.

Ken Burke, Clerk

me

__________/S/________________
James Birkhold
Clerk

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

PARK MINI STORAGE CENTER
COMPANY,

Appellant,
Lower Case No.: 05-001123-CI-13
v. Appeal No.: 2D08-3256

SAM'S EAST, INC. d/b/a
SAM'S CLUB,

Appellee.

APPELLANT'S MOTION FOR REHEARING AND REHEARING EN BANC, AND REQUEST FOR A WRITTEN OPINION

Appellant, PARK MINI STORAGE CENTER COMPANY, moves pursuant to Florida Rules of Appellate Procedure 9.330 and 9.331 for rehearing and rehearing en banc, and for a request of a written opinion.

I. MOTION FOR REHEARING

A motion for rehearing should be granted where there are "points of law or fact" that "the court has overlooked or misapprehended." Fla. R. App. P. 9.330. In that the Panel in this instant did not file a written opinion, it is difficult to determine the grounds and case law upon which the Panel relied. Nonetheless, it appears that the Panel must have overlooked the importance of several prior reported decisions of this Court as well as the Florida Supreme Court of the State of Florida.

The facts of this case involve two fundamentally important principals which are the cornerstone of our legal system. These fundamental principals include: the right of property owners in the State of Florida; and the right to present civil disputes to a jury.

The right to own property is an essential part of a free society. Property rights have traditionally been more secure in the United States than in any other country. The decision by this Court has adversely impacted the rights of private land owners and the right to be properly compensated when property values are decreased as a result of damage cause by neighboring property owners. This Court, as well as all other courts in the State of Florida, has an obligation to see that the rights of one land owner do not unjustly destroy the value and use of a neighboring property. Our legal system has evolved to cover disputes which arise over the use of private property. The courts of this state and particularly the jurors are to determine the rights and use of individual property owners. In this instant however the Trial Court and now the Appellate Court has prohibited the Appellant from bringing this land dispute to a jury. This decision conflicts with a number of pertinent prior decisions of this Court and the Supreme Court of the State of Florida as discussed below.

A. The Second District's Decision Conflicts with Prior Precedent of this Court and the Supreme Court of Florida

This case presents somewhat unique facts in that the damage alleged by the Appellant is a result of ground water intrusion caused by a neighboring property owner, Sam's Club. The damage caused by ground water intrusion is difficult to demonstrate through ordinary means because it is not something that one can visually witness. This in turn necessitates the use of expert witnesses to formulate the opinions and present those opinions to the fact finder for an ultimate determination of the monetary amount to be awarded arising out of the damages. The Court in this instance however has prohibited the Appellant from proceeding forward despite the clear recognition of such right to do so in earlier reported decisions including: Van Dusen v. Dobson, 457 So.2d 1062 (Fla. 2d DCA 1984), which relied upon this Supreme Court of Florida's decision in Cason v. Florida Power Co., 74 Fla. 1, 76 So. 535 (Fla. 1917). As a result of these decisions, the case law of this State addressing water intrusion by the neighboring property owner has consistently held that the neighboring property owner is liable for damages caused to the adjacent property. In Van Dusen, 457 So. 2d 1062, this Court reversed the Trial Court's order granting an adjoining land owner's motion for directed verdict. This Court held that whether the adjoining land owner's use of its property was unreasonable is a determination to be made by the jury. This Court went on to state that "...while the testimony was conflicting, there was competent substantial evidence of the defendants' unreasonable use of their property to the detriment of their neighbors." In reaching such a conclusion, this Court relied upon the Cason decision of the Supreme Court of the State of Florida that recognized the importance of protecting a neighboring property thereby restricting each land owner to a reasonable use of their property. This necessary concept which was expressed in the Florida Supreme Court decision in 1917 has become more important as a result of the tremendous development that has occurred in the State of Florida and throughout the United States in more recent years. As the Court stated in Cason the party responsible for the development "...may be liable in damages for such injuries to the adjoining property... and the questions of unreasonable use and resulting damages should be submitted to the jury upon appropriate instructions, when there is any substantial evidence to sustain the issue." Id. at 535.

In this instance however the Trial Court and this Court have prohibited the Appellant from submitting the questions of unreasonable use and resulting damage to the jury upon appropriate instructions. The entry of the Summary Judgment against the Appellant is in direct contradiction to the prior decisions of Van Dusen and Cason.

B. The Supreme Court of Florida as Previously Determined that the Testimony of an Expert Should be Subject to Impeachment Rather Than Exclusion

In Florida Department of Transportation v. Armadillo Partners, Inc., 849 So. 2d 279 (Fla. 2003) addressed the importance of allowing expert testimony to be presented to the trier of fact. In reaching this ultimate decision, the Supreme Court of Florida relied upon the Second District's decision in State Road Department v. Falcon, Inc., 157 So. 2d 563 (Fla. 2d. DCA 1963). In Armadillo Partners, Inc., the Florida Supreme Court Of Florida held that expert testimony should not be ruled as inadmissible but rather should be subject to impeachment, further recognizing that the subject matters of expert testimony is not always an exact science. In this instant however the Trial Court and the Panel have come to the conclusion that in order to present expert testimony, the Appellant's experts are held to a higher standard. In failing to meet that higher standard, the experts were improperly prohibited from testifying. To exclude the testimony of Mr. Blassy, Mr. Reinhart and Mr. Truex was an abuse of discretion.

This Court also addressed the exclusion of testimony of an expert witness due to an alleged non-compliance with the pre-trial order in Louisville Scrap Material Co., Inc. v. Petroleum Packers, Inc. , 566 So.2d 277 (Fla. 2d DCA 1990). This Court determined that the exclusion of testimony, whether it be expert or otherwise, is such a drastic remedy that it should only be evoked "...under the most compelling circumstance." Id. at 278. In Petroleum Packers, Inc., this Court found that the Trial Court's refusal to allow testimony from an expert that was not released until pre-trial was an abuse of discretion. Id. In this instance, the exclusion of Mr. Rothrock was necessary for the Appellant to overcome the Summary Judgment requested by Sam's Club. Mr. Rothrock is a geotechnical engineer who submitted an affidavit in opposition to the Motion for Summary Judgment submitted by Sam's Club. Mr. Rothrock's affidavit was provided to counsel for Sam's Club within the necessary time frames permitted under rule 1.510, Fla. R. Civ. P. As Mr. Rothrock's report stated, he had been investigating the issues for sometime and only completed his investigation and findings shortly before the Motion for Summary Judgment hearing. The Appellee, Sam's Club would have had sufficient opportunity to depose Mr. Rothrock in that at the time of the submission of his affidavit and report, no trial date had been set. As stated by this Court in Petroleum Packers, Inc., there was no prejudice that would be caused to the Appellee by allowing testimony of Mr. Rothrock.

In applying the standard established in Binger v. King Pest Control, 401 So. 2d 1310 (Fla. 1981), there is still insufficient grounds to prohibit the testimony of Mr. Rothrock. In Binger, the Court emphasized that the decision "... should be guided largely by a determination as whether use of the undisclosed witness will prejudice the objecting party." (Citation omitted) Id. at 1314. In this instance, there is no prejudice cause to Sam's Club since no trial date had yet been set. There was sufficient opportunity for Sam's Club to depose Mr. Rothrock. The prohibition of his testimony and report by the Trial Court stripped the Appellant of any opportunity to overcome the Motion for Summary Judgment. Mr. Rothrock's investigation revealed the failure on the part of Sam's Club to continue to operate and maintain the water management system on its property to the determent of Appellant's property. (R5091) There was no evidence to suggest that there was any sort of wrong doing on the part of the Appellant as it pertains to Mr. Rothrock.

C. The Second District Improperly Applied the Application of Section 790.407 Fla. Stat. in Prohibiting Evidence

This Court further failed to follow the prior decisions of the Second District in excluding evidence of the re-grading of the swale on the property of Sam's Club. This Court has previously determined that when a defendant's representative asserts that no changes have been made or claims that no need for changes has been recommended, plaintiff should be allowed to present evidence of the subsequent measure. Murray v. Almaden Vineyards, Inc., 429 So. 2d 24 (Fla. 2d DCA 1983). The testimony of the representative of Sam's Club clearly stated that the re-grading of this swale was not done for remedial purposes. (R2476 / Transcript 58-59). Moreover the employees of the engineering firm hired by Sam's Club testified that the swale was fine, it was within acceptable limits, and there was no reason to change it. (R2782/Transcript 46 and R2173-2174). The position taken by Sam's Club, that no remedial changes were done to the swale, demonstrates that Sam's Club has taken the position that there were no changes made or that needed to be made. Pursuant to the decision of this Court in Murray, 429 So. 2d 24, the evidence pertaining to the re-grading of the swale should be permissible evidence allowed to be heard by the jury in this case.

To deny the Appellant's right to present expert testimony as well as documentary evidence pertaining to the re-grading of the swale allowed for the entry of the Summary Judgment in favor of Sam's Club. In doing so however this Court overlooked the stringent requirements necessary for the entry of a Summary Judgment. This Court also denied the Appellant's right to have this matter determined by a jury. The Appellant has great respect for the judicial system in place and the tremendous burden placed upon the residence of this state to come forth when called to jury duty. The Appellant does not take this obligation lightly. The Appellant seeks to exercise its right to present this matter to a jury.

II. MOTION FOR REHEARING EN BANC

The Appellant moves, pursuant to Florida Rule of Appellate Procedure 9.331(d) for rehearing en banc. Both grounds for rehearing en banc are present here: this case is of uniquely exceptional importance, and en banc consideration is necessary to maintain uniformity of this Court's decisions. This case presents at least three grounds of exceptional importance.

First, the decision effects the individual rights of land owners across the State of Florida and the responsibilities that neighboring land owners have to adjoining property owners. Under this Court's opinion, an adjoining property owner can cause detrimental damage to a neighboring property without any consequence as long as such damage is done under the ground were it cannot be visually documented. This ruling violates the applicable controlling law of Florida and will affect not only the Appellant but all other individual land owners throughout the State.

Second, the Court's decision to prohibit expert testimony rather than allowing for such testimony to be presented to the jury, will undermined the entire judiciary system within this State. There will always be differing opinions of the experts whenever the necessity arises in a given case. A trial court should not be given the opportunity to bar certain testimony in order to ultimately arrive at a summary judgment decision. When a party requests a right to a jury trial, the trial court should not be given the opportunity to undermine that right by prohibiting certain testimony to be presented to the jury. Time and time again, this Court has determined that the fact finder is to weigh the evidence and that opposing counsel be given the opportunity to impeach such testimony if there is a question of its legitimacy.

Third, the prohibition of the affidavit submitted by Mr. Rothrock with the attached report undermines the applicable Florida Rule of Civil Procedure that pertains to a defending party's right to submit affidavits in defense of a summary judgment. Rule 1.510, Fla. R. Civ. P.(c), provides that a party attempting to defeat a Motion for Final Summary Judgment has until at least five (5) days prior to the hearing date or two business days prior to the hearing date to present "...any summary judgment evidence which the adverse party relies." Mr. Rothrock's affidavit was submitted within these time constraints.

The decision of this Court contradicts and departs from the many prior decisions of the Second District as well as the Supreme Court of the State of Florida. These conflicts, either over look or misunderstood, are detailed in the Motion for Rehearing. Appellant does request that these decisions and the contradictions resulting from the decision in this instant be review pursuant to the Rehearing En Banc.

III. MOTION REQUESTING A WRITTEN OPINION

The Appellant respectfully requests pursuant to Florida Rule of Appellate Procedure 9.330(a) that this Court provide a written opinion. Although the Appellant understands that the Court is not required to issue a written opinion, this request is made in good faith in that the Appellant believes that the issues presented in this appeal rise to the level that the Supreme Court of the State of Florida would grant review if an opinion were written. As described and argued fully in the Motion for Rehearing, the opinion is contradictory to the prior decisions of this Court and the Supreme Court of the State of Florida.

ATTORNEY'S STATEMENTS PURSUANT TO FLA. R. APP. P. 9.330 AND 9.331

I express a belief, based upon reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for Supreme Court review because the decision is contrary to the following decisions of this Court and the Supreme Court of the State of Florida.

I express a belief, based upon a reasoned and studied professional judgment that the decision is of exceptional importance. I further express a belief, based upon a reasoned and studied professional judgment that the decision is contrary to the following decisions by this Court and is necessary to maintain uniformity of decisions in this Court.

SECOND DISTRICT COURT OF APPEALS DECISIONS

Van Dusen v. Dobson, 457 So. 2d 1062 (Fla.2d DCA 1984)

In Florida Department of Transportation v. Armadillo Partners, Inc., 849 So.2d 279 (Fla. 2003)

State Road Department v. Falcon, Inc., 157 So. 2d 563 (Fla.2d DCA 1963)

Louisville Scrap Material Co., Inc. v. Petroleum Packers, Inc., 566 So. 2d 277 (Fla.2d DCA 1990)

Murray v. Almaden Vineyards, Inc., 429 So. 2d 24 (Fla.2d DCA 1983)

SUPREME COURT STATE OF FLORIDA DECISIONS

Cason v. Florida Power Co., 74 Fla. 1, 76 So. 535 (Fla.1917)

Binger v. King Pest Control, 401 So.2d 1310 (Fla. 1981)

POWELL CARNEY MALLER
RAMSAY & GROVE, P.A.
One Progress Plaza, Suite 1210
St. Petersburg, Florida 33701
(Ph) 727-898-9011
(Fx) 727-898-9014
Attorneys for Appellant

/S/

Karen E. Maller, Esq.
FBN 822035

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to Daniel F. Molony, Esq., Shook, Hardy & Bacon L.L.P., 100 N. Tampa Street, Suite 2900, Tampa, Florida 33601-0898 and Nailah A. Jaffree, Esq. Shook, Hardy & Bacon L.L.P.100 N. Tampa Street, Suite 2900 Tampa, Florida 33602 via U.S. Mail this 8TH day of May, 2009.

/S/

Karen E. Maller, Esq.

APPENDIX C

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
SECOND DISTRICT

PARK MINI STORAGE CENTER COMPANY, a Florida corporation,

Appellant,

v. Case No. 2D08-3256

SAM'S EAST, INC., *d/b/a* SAM'S CLUB, a foreign corporation doing business in Florida,

Appellee.

Opinion filed April 24, 2009.
Appeal from the Circuit Court for Pinellas County; Mark I. Shames, Judge.

Karen E. Mailer of Powell Carney Maller Ramsay &

Grove, P.A., St. Petersburg, for Appellant.

Naiiah A. Jaifree, Jennifer M. Voss, Daniel E. Molony, and Michael L. Rosen of Shook, Hardy & Bacon, L.L.P., Tampa, for Appellee.

PER CURIAM.

Affirmed.

DAVIS and WALLACE, JJ., and GALLEN, THOMAS M., ASSOCIATE SENIOR JUDGE, Concur.

APPENDIX D

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR PINELLAS COUNTY CIVIL DIVISION

PARK MINI STORAGE CENTER
COMPANY, a Florida Corporation,

Plaintiff,
v. UCN: 522005CA001123XX-CICI
Ref. No: 05-001123-C1-13

SAM'S EAST, INC.
d/b/a SAM'S CLUB,
a.foreign corporation doing
business in Florida,
Defendant.
________________________/

FINAL JUDGMENT FOR DEFENDANT SAM'S EAST, INC.

Pursuant to this Court's Order Granting Defendant's Motion For Final Summary Judgment entered in favor of defendant, Sam's East, Inc. d/b/a Sam's Club ("Sam's Club"), on May 27, 2008, it is hereby

ORDERED AND ADJUDGED that Plaintiff, Park Mini Storage Center Company ("Park Mini"), take nothing by this action and that Defendant, Sam's Club, shall go hence without day.

The Court retains jurisdiction to enter an award of costs and attorney's fees, as may be appropriate, against the Plaintiff, Park Mini, and in favor of the Defendant, Sam's Club, upon proper motion.

ORDERED at Pinellas County, Florida, on this _____day of _[date stamp 6/18/08]__________ 2008

/S/
HONORABLE MARK SHAMES

Conformed copies to:
Karen Mailer, Esq.
Daniel F. Molony, Esq.

APPENDIX E

IN THE CIRCUIT COURT OF THE SIXTH
JUDICIAL CIRCUIT IN AND FOR PINELLAS
COUNTY, FLORIDA
CIRCUIT CIVIL CASE NO: **05-001123-CI-13**
UCN: 522005CA001123XXCICI

PARK MINI STORAGE CENTER
COMPANY, a Florida corporation,
Plaintiff
vs.

SAM'S EAST, INC., *d/b/a* SAM'S CLUB,
a foreign corporation, doing business
in Florida,
Defendant
_______________________________________/

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE came on to be heard on the 27th day of May, 2008, upon the Defendant's Motion for Final Summary Judgment. The Court heard argument of counsel and thereafter considered the motion, affidavits, memoranda of law and the entire record herein, and being otherwise advised in the premises, does find as follows:

a) that on March 9, 2007, the Court entered its Orders *in Limine* as to Defendant's motions regarding Plaintiff's various experts and other evidence as to causation and

b) that the result of said Orders is that Plaintiff was left with no evidence as to causation. At that time, the Court granted counsel for Plaintiff's request to stay the impending jury trial in this cause to pursue an appeal of the Court's Orders;

c) that the Plaintiff exhausted its appellate review efforts without success and proceeded to pursue additional evidence from a new expert witness not previously, timely disclosed or identified in any required pre-trial disclosure. The Court has granted, simultaneously herewith, the Defendant's motion to strike this evidence;

d) that the Plaintiff has proffered additional record evidence in opposition to Defendant's motion, which the Court has now had the opportunity to review and consider. Based upon such review, the Court finds that there are no issues of material fact that arise from this evidence as to the issue of causation being attributable to the Defendant. Accordingly, it is therefore,

ORDERED AND ADJUDGED that the Defendant's Motion for Final Summary Judgment is hereby GRANTED. Counsel for the parties shall confer as to the preparation by counsel for Defendant of an appropriate Final Summary Judgment, which this Court contemplates, will be a final, appealable Order.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, this 29TH day of May, 2008.

/S/

MARK I SHAMES
CIRCUIT JUDGE

Copies furnished to:

KAREN E. MALLER, ESQ
DANIEL F. MOLONY, ESQ

APPENDIX F

IN THE CIRCUIT COURT OF THE SIXTH
JUDICIAL CIRCUIT IN AND FOR PINELLAS
COUNTY, FLORIDA
CIVIL CASE NO: 05-001123-Cl-13
UCN #522005CA001 123XXCICI

PARK MINI STORAGE CENTER
COMPANY, a Florida corporation,
Plaintiff
vs.

SAM'S EAST, INC, *d/b/a* SAM'S CLUB,
a foreign corporation doing business
in Florida,
Defendant
_______________________________________/

ORDER GRANTING DEFENDANT'S MOTION TO STRIKE EXPERT WITNESS REPORT OF JAMES E. ROTHROCK, RE.

THIS CAUSE came on to be heard on the 27th day of May, 2008, upon the Defendant's above-referenced Motion. The Court heard argument of counsel and considered the record herein, and being otherwise advised in the premises, does find as follows:

a) that on March 9, 2007, the Court entered its Orders *in Limine* as to Defendant's motions regarding Plaintiff's various experts and other evidence as to causation;

b) that at that time, the Court granted counsel for Plaintiff's request to stay the impending jury trial in this cause to pursue an appeal of the Court's Orders. Counsel for Defendant had no objection to the Plaintiff's request to continue the trial, limited to the stated purpose of such stay.

c) that the Court further directed that upon completion of the appellate review, notwithstanding the outcome, a case management conference was to be promptly set by Plaintiff's counsel;

d) that the Plaintiff exhausted its appellate review efforts without success and proceeded to pursue additional testimony from a new expert witness not previously, timely disclosed or identified in any required pre-trial disclosure. At no time did counsel for Plaintiff set a case management conference after completion of its appeal efforts, nor seek leave of Court to reopen the closed discovery or to allow additional witnesses. Counsel for Defendant timely objected to Plaintiff's attempts to avail itself of new evidence, suggesting that the evidence was not only untimely, but that it created a new theory of liability after such issues had been set before the impending trial;

e) that the Court appreciates Plaintiffs position that excluding its new and perhaps only witness would be prejudicial. The Court further appreciates the well-reasoned authorities cited by Plaintiff that such result is not favored. Based upon the actions of Plaintiff to date, however, this proceeding has been delayed more than a year to allow Plaintiff to pursue relief that was perceived from the outset as not likely to receive favorable consideration. The result of Plaintiffs efforts to reopen the evidence at this point, notwithstanding that the trial has not presently been placed back on the Court's calendar, would be to start this three-year old proceeding over again, without regard to the significant expense that the Defendant has incurred in reaching the posture it achieved up to the point of Plaintiffs abatement. To require Defendant to bear the additional expense and time of starting over again with new discovery and new issues would be inappropriate, especially when its position was achieved, contrary to that of the Plaintiff, by compliance with and adherence to the orders and schedules established by the Court. Accordingly, it is therefore,

ORDERED AND ADJUDGED that the Defendant's Motion to Strike Expert Witness Report of James E. Rothrock, P.E. is hereby GRANTED. Absent any additional intervening appellate proceedings, this matter should be placed back on the Court's trial calendar, based upon the testimonial and documentary evidence previously set, and without additional discovery.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, this 29th day of May, 2008.

/S/

MARK I. SHAMES
CIRCUIT

JUDGE

Copies furnished to:

KAREN E. MALLER, ESQ
DANIEL F. MOLONY, ESQ

APPENDIX G

IN THE CIRCUIT COURT OF THE SIXTH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA, IN AND FOR PINELLAS COUNTY
CIVIL DIVISION

PARK MINI STORAGE CENTER
COMPANY, a Florida Corporation,

Plaintiff,

UCN: 522005CA001123XX-
CICI

v.

Ref. No: 05-001123-C1-13

SAM'S EAST INC. d/b/a
SAM'S CLUB, a foreign
corporation doing business in
Florida,

Defendant.

_______________________________/

ORDER GRANTING DEFENDANT SAM'S CLUB'S MOTION IN LIMINE TO EXCLUDE SPECULATIVE TESTIMONY OF PLAINTIFF'S STRUCTURAL EXPERT, ROBERT J. REINHART

THIS CAUSE came before the Court for hearing on Friday, March 9, 2007, on Defendant's Motion in Limine to Exclude Speculative Testimony of Plaintiffs Structural Expert, Robert J. Reinhart. After considering argument of counsel, and being otherwise fully advised in the premises, it is

ORDERED and ADJUDGED that Defendant's Motion in Limine to Exclude Speculative Testimony of Plaintiff's Structural Expert, Robert J. Reinhart is hereby GRANTED.

DONE AND ORDERED this _[9]___ day of March, 2007, in Chambers at St. Petersburg, Pinellas County, Florida.

/S/

The Honorable Mark I. Shames

Copies to:
Daniel F. Molony
Karen E. Maller

APPENDIX H

IN THE CIRCUIT COURT OF THE SIXTH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA, IN AND FOR PINELLAS COUNTY
CIVIL DIVISION

PARK MINI STORAGE
CENTER COMPANY, a Florida
Corporation,
UCN: 522005CA001123XX-
CICI
Plaintiff. Ref. No: 05-001123-CI-13

v.

SAM'S EAST, INC. d/b/a
SAM'S CLUB, a foreign corporation
doing business in Florida,

Defendant.
________________________________/

ORDER GRANTING DEFENDANT SAM'S CLUB'S MOTION IN LIMINE TO EXCLUDE UNDISCLOSED EXPERT OPINION TESTIMONY

THIS CAUSE came before the Court for hearing on Friday, March 9, 2007, on Defendant's Motion in Limine to Exclude Undisclosed Expert Opinion Testimony. After considering argument of counsel, and being otherwise fully advised in the premises, it is

ORDERED and ADJUDGED that Defendant's Motion in Limine to Exclude Undisclosed Expert Opinion Testimony is hereby GRANTED.

DONE AND ORDERED this __ [9] __day of March, 2007, in Chambers at St. Petersburg, Pinellas County, Florida.

/S/
The Honorable Mark I. Shames

Copies to:
Daniel F. Molony
Karen E. Mailer

APPENDIX I

IN THE CIRCUIT COURT OF THE SIXTH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA, IN AND FOR PINELLAS COUNTY
CIVIL DIVISION

PARK MINI STORAGE CENTER
COMPANY, a Florida Corporation,

Plaintiff, UCN: 522005CA001123XX-CICI
Ref. No: O5-OO1123-CI-13

v.

SAM'S EAST, INC. d/b/a
SAM'S CLUB, a foreign corporation
doing business in Florida,

Defend ant.
_______________________________/

ORDER GRANTING DEFENDANT'S MOTION IN LIMINE TO EXCLUDE INADMISSIBLE SUBSEQUENT REMEDIAL MEASURE EVIDENCE

THIS CAUSE came before the Court for hearing on Friday, March 9, 2007, on Defendant's Motion in Limine to Exclude Inadmissible Subsequent Remedial Measure Evidence. After considering argument of counsel, and being fully advised in the premises, it is

ORDERED and ADJUDGED that Defendant's

Motion in Lirnine to Exclude Inadmissible Subsequent Remedial Measure Evidence is hereby GRANTED.

DONE AND ORDERED this [9] day of March, 2007, in Chambers at St. Petersburg, Pinellas County, Florida.

/S/
The Honorable Mark I. Shames

Copies to

Daniel F. Molony
Karen E Maller

APPENDIX J

IN THE CIRCUIT COURT OF THE SIXTH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA, IN AND FOR PINELLAS COUNTY
CIVIL DIVISION

PARK MINI STORAGE CENTER
COMPANY, a Florida Corporation,

Plaintiff,

UCN: 522005CA001123XX-CICI
v.
Ref. No: 05-001123-CI-13

SAM'S EAST, INC. d/b/a SAM'S
CLUB, a foreign corporation doing
business in Florida,

Defendant.
________________________________/

ORDER GRANTING DEFENDANT SAM'S CLUB'S MOTION IN LIMINE TO PRECLUDE PLAINTIFF'S EXPERTS FROM OFFERING ANY TESTIMONY ABOUT MAINTENANCE OF SAM'S CLUB'S DRAINAGE SWALE

THIS CAUSE came before the Court for hearing on Friday, March 9, 2007, on Defendant's Motion in Limine to Preclude Plaintiff's Experts from Offering any Testimony about Maintenance of Sam's Club's Drainage Swale. After considering argument of counsel, and being otherwise fully advised in the premises, it is

ORDERED and ADJUDGED that Defendant's Motion in Limine to Preclude Plaintiff's Experts from Offering any Testimony about Maintenance of Sam's Club's Drainage Swale is hereby GRANTED.

DONE AND ORDERED this [9] day of March, 2007, in Chambers at St. Petersburg, Pinellas County, Florida.

/S/
The Honorable Mark I. Shames

Copies to:

Daniel F. Molony
Karen E. Maller

APPENDIX K

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR PINELLAS COUNTY
CIVIL DIVISION

PARK MINI STORAGE CENTER
COMPANY, a Florida Corporation,

Plaintiff,

v. UCN: 522005CA001123XX-
CICI

Ref. No: 05-001123-CI-13

SAM'S EAST, INC. d/b/a
SAM'S CLUB, a foreign corporation
doing business in Florida,

Defendant.
_______________________________/

ORDER GRANTING DEFENDANT'S MOTION IN LIMINE TO EXCLUDE OPINION TESTIMONY OF ADEL BLASSY

THIS CAUSE came before the Court for hearing on Friday, March 9, 2007, on Defendant's Motion in Limine to Exclude Opinion Testimony of Adel Blassy. After considering argument of counsel, and being otherwise fully advised in the premises, it is

ORDERED and ADJUDGED that Defendant's Motion in Limine to Exclude Opinion Testimony of Adel Blassy is hereby GRANTED.

DONE AND ORDERED this [9] day of March, 2007, in Chambers at St. Petersburg, Pinellas County, Florida.

/S/

The Honorable Mark I. Shames

Copies to:

Daniel F. Molony
Karen E. Mailer

APPENDIX L

1.0 INTRODUCTION and SCOPE

1.1 GENERAL

In this report, we present the results of the civil and geotechnical engineering studies relative to groundwater intrusion at the existing facilities of Park Mini Storage, located in Pinellas Park, Florida. We have divided this report into the following sections:

- INTRODUCTION and SCOPE - Description of project; outline of services performed
- FINDINGS - Conditions encountered and identified; data developed in the course of the studies
- DISCUSSION and RECOMMENDATIONS - Observations; suggested courses of action
- LIMITATIONS - Restrictions inherent in geotechnical engineering and in this report
- SUMMARY - Brief recapitulation of information presented in this report
- FIGURES and APPENDICES - Support materials referenced in this report

1.2 PROJECT DESCRIPTION

From a site meeting on June 29, 2007, subsequent site meetings and evaluations, and other related studies, it is our understanding that Park Mini Storage has experienced water intrusion problems during recent years. The water intrusion has affected Buildings "M" and "N," the storage buildings which extend parallel to, and alongside, the northern and western property lines, respectively. Immediately west of Building "N," a shallow drainage swale serves as a part of the stormwater management system for the facilities of the adjacent Sam's Club. It is this swale, and the rainfall runoff from the Sam's Club which accumulates there, that appear to have resulted in the water intrusion in the storage building. The water intrusion reportedly first was noted during the Year 2000, and became increasingly severe in the years which followed.

Previous groundwater hydrologic and engineering studies have documented the effects of the stormwater on the groundwater regime and, in turn, the effect of the groundwater on the storage building. Additional evaluations are sought which would augment these previous studies, by (1) evaluating the geotechnical (soils) engineering aspects of the stormwater concerns, (2) examining the performance of the stormwater management system serving Sam's Club, and (3) relating the present studies to the findings and recommendations from the numerous other previous groundwater hydrologic and engineering studies.

Park Mini Storage is located at postal address 6901 Park Boulevard in Pinellas Park, Florida, in Section 30, Township 30 South, Range 16 East in southern Pinellas County, Florida. The Pinellas County Property Appraiser identifies the property under Parcel ID No. 30/30/16/35064/000/0090.

1.3 PURPOSE

The purposes of this investigation were to:

- Explore the surface and subsurface conditions on the property, in the light of its surroundings;

- Evaluate the soil and groundwater conditions, to assess their contribution to the concerns noted; and

- Review the stormwater analyses, to identify any variance in the system performance from the original design criteria and performance.

This report contains the results of our investigations, engineering interpretations of the on-site and off-site improvements with regard to the flooding concerns which have been noted on the subject property, and discussion of appropriate measures to be taken, to provide remedy to the conditions now present and to provide measured protections against flooding in the future.

Our present studies are based on the considerations described in the preceding sections. The report further presents an evaluation of the surface and subsurface conditions on the basis of traditional civil and geotechnical engineering procedures. Contact *Windermere Properties* and Engineering Services, if any of this information is incorrect or the scope of our studies differs from that which is desired, so we may review our project approach and recommendations accordingly.

1.4 FIELD INVESTIGATION

Subsurface explorations were performed on December 22, 2007. Subsurface explorations consisted of eleven manual auger borings advanced to depths ranging from 1 foot to 6 feet, in accordance with the procedures of ASTM D-1452. Six of the manual auger borings were performed inside the existing storage buildings. It was first necessary to drill through the floor slab of the building, using a rotary drill with a hollow steel core barrel. Locations of the slab cores and manual auger borings were established in the field by *Windermere Properties* and Engineering Services, Inc.

In the course of the preliminary site reconnaissance on June 29, 2007, and several subsequent visits, we examined the subject property, met with Ms. Liz Nash, the facility manager, and obtained photographs to document the present condition of the facilities and the surroundings. Following the completion of our studies, soil samples resulting from our auger borings will be retained for 1 year after issuance of this report, unless you request we retain them for a longer period.

1.5 LABORATORY INVESTIGATION

Soil samples recovered from the exploration borings were returned to the laboratory, where a geotechnical engineer visually examined the soils and reviewed the field descriptions. Representative soil samples were selected for laboratory testing, consisting of five moisture content determinations and five soil fines (percent passing No. 200 sieve) determinations.

These tests were performed as aids in classifying the soils and to evaluate the engineering characteristics of the soils: See Appendix A: Boring Logs Key to Boring Logs and Description of Testing Procedures, for further data and explanations.

1.6 REFERENCE MATERIALS

We reviewed the U. S. Geologic Survey topographic and aerial photographic maps, and the U. S. Department of Agriculture, Natural Resources Conservation Service (NRC S) Soil Survey of Pinellas County, Florida, for relevant information about the site. We also examined numerous design drawings and survey documents of Park Mini Storage and Sam's Club, in the course of performing these studies. These documents are cited as footnote references that appear in the discussion in the report. The references which provide a basis for the discussion are identified in the Appendix.

2.0 FINDINGS

2.1 REGIONAL TOPOGRAPHY and HYDROGEOLOGY

Surface conditions were the subject of a visual site inspection by a *Windermere Properties* and Engineering Services geotechnical engineer. Figure 1: **General Site Plan**, shows the layouts of the entire Park Mini Storage and Sam's Club sites. Figure 2: **Site Exploration Plan**, shows those portions of the facilities which provide the basis for the discussion throughout the report.

The U.S. Department of Agriculture, Natural Resources Conservation Service (NRCS) Soil Survey of Pinellas County Florida (1972) identifies two soil types on, and in the general vicinity of, Park Mini Storage and the adjacent Sam's Club properties, as indicated in Table 1 below:

TABLE 1

USDA Soil Classifications*

Soil Symbol	Soil Name	Topographic/ Drainage Characteristics	Predicted Seasonal High Water Table	Location on Site
Ma	"Made" land	**Not defined**	**Not predicted or estimated**	Primarily in Park Mini Storage property
My	Myakka fine sand	Nearly level and poorly drained***	Less than 10 inches for 1 to 4 months	Primarily in Sam's Club property

* REFERENCE: USDA Soil Conservation Service, 1972.
** At ground surface or feet below ground surface, except where indicated as "+."
***The Pinellas County Soil Survey also estimates the permeability of the surficial layer of the Myakka fine sand at between 6.3 and 20 inches per hour. The permeability of the underlying soil layer is somewhat more restricted, being between 0.63 and 2 inches per hour.

The Pinellas County Soil Survey indicates the "Made" land consists of "mixed sand, clay, hard rock, shells, and shell fragments that have been transported, reworked, and leveled by earth-moving equipment." In the general vicinity of Park Mini Storage, the instances of "Made" land are clustered along Channel 5, a regional stormwater drainage channel which adjoins the Park Mini Storage property along its southeastern property boundary. The channel conveys surface drainage (rainfall runoff) toward the southern part of Pinellas County. It is reasonable to assume the "Made" land consists of excavated materials resulting from the construction of Channel 5, or primarily sand soils with a lesser fraction of silt. Still, the "Myakka fine sand" classification indicates poor drainage characteristics in the natural state, given the fairly level topography and high groundwater table.

Understanding the regional topography aids to understanding the discussion which follows. Starting a distance roughly 1,000 to 1,500 feet northwest of Sam's Club, the U.S. Geologic "Pinellas Park Florida" topographic map indicates the terrain exhibits a downhill slope toward the southeast. Throughout Park Mini Storage and Sam's Club, the average downhill slope is gentle, falling approximately 5 feet over a distance of 1,200 feet (0.4 percent), from about 15 feet (to the northwest) to approximately 10 feet (to the southeast) near Channel 5. Along the property boundary of Park Mini Storage, the excavated bottom of Channel 5 lies at an elevation of approximately 1 to 3 feet.

In addition to providing the drainage of surface water throughout the general vicinity, Channel 5 exerts influence on the groundwater on the property of Park Mini Storage, as well as portions of the Sam's Club property. While the "Made land" soil classification describes materials which might reasonably vary in composition, it is assumed groundwater levels in these soils should be influenced (drawn down) proportional to their distance away from Channel 5. Groundwater contours should indicate this influence, which would be greatest near Channel 5 and diminish with increasing distance away from the channel, to the west and northwest. Groundwater flow also should both flow in a perpendicular manner toward Channel 5 *and* follow the surface topography; that is, from northwest to southeast. Studies performed by GeoEngineering, Inc. on behalf of Park Mini Storage in 2004 and 2005(1) have discussed the nature of the groundwater flow and drawdown across the site.

Prior to the development of Park Mini Storage, Ca. 1980, the majority of both the Park Mini Storage and Sam's Club properties was largely open and undeveloped. In the natural ("pre-development") condition, much of the land remained open and available to assimilate rainfalls into the groundwater table ("pervious" area). After the construction of Park Mini Storage, the Sam's Club property was occupied by an automotive towing/salvage yard and an automotive repair shop, whose combined buildings and pavements ("impervious" area) were small, although the design analyses indicate partially-impervious limerock base was present on larger areas. Site grades generally reiriained near the natural elevation, since negligible quantities of fill were placed in conjunction with the buildings and pavements constructed for those facilities.

With the construction of Sam's Club, a large majority of the 17-acre site area was converted to impervious area. Development involved placement of an approximate average of 1to 3 feet of fill above the original site grades, except for the stormwater ponds, which were excavated below the original grades. Green spaces were limited to isolated traffic islands, lands adjoining the stormwater ponds, conservation areas in the northern and northeastern parts of the property, and green spaces along the property boundaries, including the drainage ditch between the parking lots and driveways of Sam's Club and the Park Mini Storage property. The characteristics of stormwater infiltration also changed greatly. In the pre-development condition, infiltration would be expected to be largely uniform across the property. In contrast, post-development infiltration would be concentrated in the ponds and open channels in which stormwater collected. Infiltration from the stormwater would occur whenever water was retained in the ponds and open channels, for the period during which the water remained present. The previous GeoEngineering Studies further discussed this effect.

2.2 SURFACE and SITE EVALUATIONS

The existing physical condition of Park Mini Storage Building "N," and the impacts resulting from the offsite drainage and development, have been documented by previous studies. Our examination of the building confirmed those previous findings.

Working from vantage points on the public rights-of-way and from the Park Mini Storage property, we also examined the stormwater ponds and surface water conveyance channels of the Sam's Club property which were nearest to Park Mini Storage. To the rear (west) of Building "N," the slope of the adjacent stormwater drainage channel appeared irregular, possibly resulting from erosion and sedimentation over its approximate 15-year service life. It also has been noted there have been measures to regrade portions of the swale. Along Park Boulevard, we examined Ponds 11 and 13, to compare them to the original design. Both ponds appeared to be filled with significant quantities of sediment, reducing them significantly from their original size. This was most apparent at the westernmost part of Pond ii, which extends toward Belcher Road along the northern property boundary of an outparcel (service station). Sedimentation depth in this part of the pond was estimated at 1 to 2 feet. In this area, the design drawings identify an underdrain which connects to a public stormwater manhole along Belcher Road. The presence of sedimentation would inhibit infiltration from occurring in the underdrain. Lastly, we examined Pond 1 (the larger pond in the northeastern part of the Sam's Club property) from offsite areas. The shoreline of the pond appeared to have been cleared of large trees, the stumps of which were apparent along the banks of the pond. The original design called for a network of pipes providing discharge of the retained water into side bank underdrains at the northern and eastern sides of the pond, discharging downstream of the weir at the discharge structure. Several of these underdrains appeared to be missing or submerged, even though our examination occurred after a sustained dry period.

2.3 SUBSURFACE CONDITIONS

Figure 2: **Site Exploration Plan** shows the locations of the manual auger borings performed during the present studies. Appendix A: Boring Logs, provides graphical depiction of the soils encountered by each auger boring. The classifications and descriptions shown on the logs are generally based on visual characterizations of the recovered soil samples. Also, see Appendix A: Key to Boring Logs,

for further explanation of the symbols and placement of data on the Boring Logs.

The soils encountered by our manual auger borings consisted of sand-silt-clay mixtures with varying amounts of rock, wood fragments and crushed stone fragments. The soils ranged from "clean" sand (less than *5* percent soil fines) to sand with silt *(5* to 12 percent soil fines), and occasionally silty sand (12 percent soil fines or more). Auger boring N-I 4 encountered a zone of silty clay near the maximum depth explored. The composition of the sand-silt-rock mixture was variable. In several instances, refusal of the manual auger on crushed stone materials prevented advancing the boring further.

We encountered groundwater in auger boring N-14 at a depth of 4.7 feet after the water level had stabilized in the auger borings. After the borings were completed, all were filled with the soil cuttings. The concrete floor slabs in the storage building were then patched with Portland cement concrete.

2.4 STORMWATER RECORDS, EVALUATION and MODELING

Next, we reviewed the records on file at the Southwest Florida Water Management District, including the original stormwater permit documents and analyses used in permitting the facilities, records of enforcement actions by the water management district, and records of as-built evaluations and reviews of the condition of the stormwater management system. Our findings were as follows:

1. The original stormwater system was designed to provide both attenuation (reducing peak rate of stormwater discharge from the site) and treatment (addressing water quality of rainfall runoff). The two smaller ponds (Ponds 11 and 13) along Park Boulevard are connected to each other, and also to the drainage channel at the eastern property boundary, alongside Building "N." Water from these two ponds discharges to the aforementioned underdrain which the design drawings indicate connects to the public stormwater manhole along Belcher Road. The two ponds also are connected through a network of pipes, having diameters ranging from 36 to 48 inches, which discharge to the third, larger pond (Pond No. 1) in the northeastern part of the Sam's Club property. The piping network lies at a low elevation (Invert Elevation 7.83 feet and lower), such that the water levels in the three ponds stabilize at equal levels, except during storm events, during which the water levels in Ponds 11 and 13 can "back up" in the system, and rise higher than the water level in Pond 1. When sufficient stormwater quantity is captured by the ponds, water discharges, via the third pond, which overflows via a weir and a 19 inch by 30 inch elliptical pipe to a low area which adjoins Channel 5. When sufficient water accumulates in the system, the design analyses indicate the water reaches an elevation sufficient to flow *backward* through the system into the swale along the western property boundary of Park Mini Storage.

The stormwater modeling for the project was performed using the engineering software "Advanced Interconnected Pond Routing" (adICPR), a widely-accepted engineering software package designed to evaluate stormwater stages and flows through a network of ponds, channels, and conveyance pipes, appropriate to the present conditions. The software considers a rate of flow into the system (hydrograph) which represents an assumed rainfall quantity and rate of rainfall distribution over a period of hours. The design storm represents the assumed storm having a given statistical probability of re-occurrence, as required by the water management district as the basis for permit approval. Throughout the storm event, and thereafter, the software gives the peak "stages" (water surface elevations) and flows (throughout the interconnecting piping system) which would be expected to occur.

In addition to the adICPR modeling data, the ponds also provide treatment of the water quality, to prevent undesirable impacts on water quality when stormwater leaves the site. The aforementioned underdrains are intended to provide this function, drawing the ponds one-half foot lower than the level the ponds normally would recede at the end of a storm.

Three documents identify the stormwater management characteristics described above:

A. Southwest Florida Water Management District (SWFWMD) Surface Water Management Permit

Application No. 91-0083 dated March 26, 1991 (2) The Pinellas County Board of County Commissioners requested additional information by letters dated July 26, 1991 and August 27, 1991. No additional information was received, and the application was denied by letter dated September 12, 1991. By letter dated September 16, 1991, Cumbey & Fair, Inc., the project designer, stated the additional information was not submitted "...due to other [project-related] considerations." As originally submitted, the design analysis indicated Pond 13 being connected to Pond I via Pond 11. Ponds 11 and 13 are connected by two 36-inch diameter pipes having a combined length of 114 feet, and Ponds I and 11 are connected by 9 separate pipes having diameters ranging from 36 to 48 inches, and having a combined length of 1,320 feet. Two additional pipes, having diameters of 15 and 18 inches and having a combined 85-foot length, connect Pond 13 to the drainage swale along the eastern property boundary (alongside Park Mini Storage Building "N"). Still another 24-inch diameter pipe was to provide stormwater discharge from Pond 13 directly to existing drainage along Park Boulevard. A total of 4.99 acres, predominantly consisting of impervious site areas, discharged to Pond 13. The analyses indicate Pond 1 achieves a peak stage of 11.74 feet, Pond 11 a peak stage of 12.04 feet, and Pond 13 a peak stage of 11.98 feet. In the swale along the eastern property boundary, the peak stage in the swale at the storm drain inlet (in the southern part of the swale) was 12.06 feet.

B. The original (incomplete, and subsequently denied) permit application was replaced by SWFWMD Surface Water Management Permit Application No. 92-0018 dated November 20, 1991 **(3)** The analyses were revised to reflect a single 42-inch diameter pipe connecting Ponds 1 and 11, having a length of 1,327 feet, and a single 36-inch diameter pipe connecting Ponds 11 and 13 having a length of 114 feet. The analyses do not indicate any pipe or conveyance connecting the drainage swale at the eastern property boundary to Pond 13. The analyses indicate Pond 1 achieves a peak stage of 11.44 feet, Pond 11 a peak stage of 11.87 feet, and Pond 13 a peak stage of 12.03 feet. As stated above, the revised analyses indicated no pipe connecting to the drainage swale at the eastern property boundary; thus, no stage information is available for stormwater in the swale. The analyses no longer indicated the 24-inch diameter pipe which was part of the original design analyses, which routed discharge from Pond 13 directly to existing the drainage along Park Boulevard.

Among the review comments by the Pinellas County Board of County Commissioners was a comment stating, "The swale along the east site boundary adjacent to the delivery drive is to be eliminated and runoff from said drive picked up in curb inlet(s). Revised storm sewer tabulations will be required for the additional inlet(s)." A March 11, 1992 Cumbey & Fair transmittal to Mr. Delfin Fernandez of Pinellas County Land Development/Permitting indicates the plans (Sheets 3 and 11) "...have been revised to reflect the regrading we discussed along the eastern property boundary", possibly referring to the revisions.

C. The construction plans for Sam's Club were prepared by Cumbey & Fair, Inc., and were approved for construction by Pinellas County Land Development/Permitting Division on April 29, 1 The plans indicate Pond 13 being connected to Pond 1 via Pond 11, similar to the original permit application, except the total number of pipes connecting Ponds 1 and 11 was increased from 9 to 10, and the total length of the pipes increased from 1,320 to 1,354 feet. Sizes remain essentially unchanged, ranging from 36 to 48 inches. Ponds 11 and 13 are connected by two 36-inch diameter pipes having a combined length of 114 feet, similar to the original permit application. Two additional pipes, both having diameters of 18 inches and having a combined 70-foot length (diameters and lengths changed from the original design analyses), connect Pond 13 to the drainage swale along the eastern property boundary (alongside Park Mini Storage Building "N"). No connection exists between Pond 13 and the existing drainage along Park Boulevard, as this was deleted from the second permit application No. 92-0018 of November 20, 1991.

The construction plans (Sheets 3 and 10) indicate ground surface elevations of the tops of the banks (or berms) along the southern sides of Ponds 11 and 13 are 12.4 feet and 12.5 feet, respectively. At the southernmost part of the swale, at the eastern property boundary, the ground surface elevation is indicated by a "spot" elevation of 12.5 feet. In the two driveways connecting Sam's Club to Park Boulevard, to the east and west of Pond 13, the plans indicate the ground surface rises to elevations of 12.35 and 12.10 feet, respectively. Further, the plans indicate the top of bank (berm) elevation at Pond 1 is 12.00 feet. The construction plans (Sheet 11) further indicate the typical cross section of the swale at the eastern property boundary, alongside Park Mini Storage Building "N." The cross section indicates a bottom elevation of 11.0 feet, and a top elevation of 12.08 feet at the top of the berm along the eastern side of the swale. This differs from the "spot" elevations shown on Sheet 3, which range from 11 .0 to 11.5 to 13.0 from south to north along the swale. Lastly, the plans show an underdrain along the northern side of Pond 11, having a length of 280 feet and connecting to an existing storm drainage structure to the west, on Belcher Road.

A Boundary and Topographic survey also was part of the Cumbey & Fair plans. The survey indicates the finished floor elevations of Park Mini Storage Building "N" range from 12.11 feet to the south to 12.17 feet to the north, while the finished floor elevation of Building "M" was indicated as 11.35.

2. In the Year 2000, or possibly in the following year, Sam's Club constructed a new fueling station, which involved approximately an additional 16,000 square feet of impervious area (buildings and pavements). Rainfall runoff from the new impervious area discharged to the existing Pond 13 via two concrete flumes.5 No further modifications are believed to have been made to the stormwater management

system at that time, as a May 10, 2000 letter from MDM Services, Inc. to the Southwest Florida Water Management District stated the original permit was sufficient to provide for the proposed addition, with no modification.6 In 2004, the fueling station was remodeled, resulting in a slight decrease in impervious area. Again, no modifications were made to the stormwater management system.7

3. By a letter ("Project Information Review List") dated March 25, 2004, the Southwest Florida Water Management District noted a Statement of Completion and As-Built drawings never were submitted for the original project. Submittal of these was requested, along with documentation that the surface water management system still functioned as permitted and designed. By letter dated May 17, 2004, Kimley-Horn Associates, Inc.8 submitted an as- built survey and letter stating the facilities are in accordance with the design plans, and the system functions as originally permitted and designed. The as-built plan shows elevations ranging from 11.01 to 11.64 feet along the centerline of the channel extending to the west from the northwestern corner of Pond 11, an area for which the construction plans indicated elevations were as low as 8 feet at the east, and remained below 10 feet along its entire length. The as-built plan further indicates a Top of Bank "spot" elevation of 1 1.60 feet at one point along the southern side of Pond 1, and five "spot" elevations immediately beyond the southern property boundary south of Pond 1 (immediately north of Park Mini Storage Building "M" ranging from 11.97 to 12.11 feet. Lastly, the as-built plan notes the underdrain

which was to have been installed along the northern side of Pond 11 was "not found."

4. Beginning on November 7, 2005, a number of requests were made by the Southwest Florida Water Management District for submittal of an inspection report, assuring the surface water management system is properly operated and maintained.9 Subsequent letters requesting inspection reports, and Statement of Inspection for Proper Operation and Maintenance were dated January 10, 2006,° May 9, 2006,(1D March 14, 2007,(12) April 13, 2007, April 27, 2007,' and May 7, 2007.(15) A Statement of Inspection for Proper Operation and Maintenance dated June 28, 2007 was submitted by Kimley-Horn and Associates, Inc. To assess the impacts by the as-built configurations of the stormwater retention ponds, we evaluated the ponds using the same "adICPR" software as that which was used to perform the original stormwater modeling in the early 1 990s. Aside from the changes reflected by the as-built data, we used the other input parameters from the original analyses.

Two other assumptions were made in these analyses.

1. Our stormwater analyses have assumed the drainage channel along the eastern property boundary of Sam's Club cannot discharge freely to Park Boulevard, south of the ditch bottom inlet. The design indicates the elevation in this area is 12.5 feet. Farther north in the swale, various references have noted there were modifications to the stormwater drainage channel inside the eastern

property boundary of Sam's Club, parallel to the rear (western) wall of Building "N" in late 2004 or 2005. These modifications reportedly involved grading in the southern part of the channel to alleviate an area of high ground which was believed to be blocking the channel and capturing water, affecting proper drainage. If these modifications involved removal of the area of high ground near Park Boulevard, then the proper function of the stormwater drainage system may have been compromised by allowing unauthorized discharge to an offsite area, without proper retention.

2. During our examination of Ponds 11 and 13 from the Park Boulevard right-of-way, we noted a shelter which was recently constructed at the bus stop along Park Boulevard. Based on permit documents obtained from the City of Pinellas Park, it appears the shelter was constructed in July 2007 or at some date later that year. Part of the construction involved regrading an area of land between Park Boulevard and Pond 11, in the southwestern part of the Sam's Club property. In the process, the crest elevation of the embankment was reduced by an estimated 9 inches, thereby resulting in a breach in the embankment of the stormwater retention pond, sufficient to allow the pond to discharge directly onto Park Boulevard during high stormwater stages in the pond. The breach in the embankment should be repaired, to restore the integrity of the stormwater retention system. Our analyses have assumed this matter would be addressed.

3.0 DISCUSSION and RECOMMENDATIONS

3.1 STORMWATER MODELING

As stated previously, evaluation of the stormwater management system of Sam's Club incorporated the as-built conditions of the ponds, and followed the same analysis methods used in the original design analysis. Key findings of these analyses are given below:

The pond configurations from the as-built survey, having reduced storage volumes, result in peak stormwater elevations which are higher than the peak stages which formed the basis of the original stormwater permit. We replicated the adICPR evaluations performed as a part of the second permit application No. 92-0018 dated November 20, 1991. The only change involved the replacement of the original pond sizes with the sizes identified by the 2004 as-built data developed by Kimley-Horn and Associates, Inc. The analyses also used the same 25-year, 24-hour design storm.

On this basis, the peak stages in Pond I reach 12.29 feet, compared to the 11.44-foot peak stage of the original analyses, an increased elevation of 0.85-foot (10.2-inches). Pond 11 achieves a peak stage of 12.43 feet, an increase of 0.56-foot (6.7 inches) above the peak stage predicted by the permit documents. Pond 13 achieves a peak stage of 12.37 feet, an increase of 0.34 feet (4.0-inches) above the peak stage predicted by the permit documents. Since Pond 1 3 is directly connected to the ditch bottom inlet in the drainage channel along the eastern property boundary (adjacent to Building "N" in Park Mini Storage), accumulated stormwater would flow toward the east, discharging from the inlet and filling the swale alongside Building "N." It was earlier noted that the construction plans indicate the tops of the embankments (berms) of Ponds 1, 11 and 13 at elevations 12.00, 12.4 and 12.5 feet, respectively. Thus, at the calculated peak pond stages, accumulated stormwater would flow over the tops of the embankment in Pond 1. This would limit the peak stage of Pond I to a lower value. This may in turn reduce the peak stages of the other two ponds as well, although this effect would be expected to be minor, given the piping distance between the ponds, over 1,300 feet.

2. In the preceding discussion, it is significant to note the groundwater elevations, groundwater hydrology, etc. become much more closely related to the high water levels achieved in the swale adjacent to building "N," and also Ponds 1 and 11, the two ponds closest to Park Mini Storage Buildings "M" and "N." The peak stages achieved in the swale and the ponds, and the periods during which the peak stages remain present, have a direct effect on the groundwater elevations. Since surface water has, in times past, flooded the ponds and swale at elevations higher than the floor elevations inside the storage buildings, the groundwater levels can cause seepage through the floor slab inside, and even cause buildup of groundwater pressure against the slab in areas having no floor cracks.

3. **While it is not presently known whether previous storms have approached the design storm, the calculations validate fact that the Sam's Club stormwater retention system *can, and has,* flooded Buildings "M" and "N," given the proper circumstances.** Photographs taken during 2003 show the drainage channel adjacent to Building "N" flooded to the extent it had spilled over the small berm at the eastern side of the swale (the construction plans indicate the top elevation of the berm is 12.08 feet). Little or no grass is visible above the water level, along the rear wall of the building, indicating water had risen near or above the floor elevation inside the storage units.

3.2 PREVIOUS STUDIES AND REPORTS

Our review of studies performed previously for Sam's Club and/or its legal counsel have identified the following inconsistencies or areas which warrant discussion:

Jeffrey Trommer and David Wiley, Professional Geologists of Legette, Brashears & Graham, Inc. argue that flooding could not occur in the swale. In its May 9, 2006 report7, the authors state, "Since no stormwater is routed to the swale, the amount of water reaching the drainage swale area is the same as what occurred on that area prior to construction of the Sam's Club." The report fails to recognize the backwater conditions which result during intense rainfall periods, including the design storm. **As stated previously, any predictive discussion involving the groundwater hydrology of the site must consider the close relationship that exists between the groundwater and surface water in the swale and ponds closest to the Park Mini Storage property, and the effects on the groundwater of periods of peak surface water stage, even brief periods.**

It is noted that analyses of the performance of a surface water management system consisting of ponds interconnected with piping systems, whose analyses involve disposal of stormwater via surface water discharge only, are *not* within the purview of professional geologists.

2. Legette, **Brashears & Graham attribute hydrologeologic performance characteristics to a site area whose subsurface conditions are** unknown. Its report acknowledges, "The [Pinellas County Soil Survey] map also shows that the eastern edge of the site and all of the storage facility property are underlain by 'made soil,' which means fill material." As quoted previously above, the soil survey predicts a wide range of materials can be present in areas having the "made land" classification. Our present studies validate the soil survey prediction, with findings of rock, debris, and crushed stone fragments which could not be penetrated using hand tools. Figure 3 of the Legette, Brashears & Graham studies then predict water-table contours based on their assumed subsurface

conditions. The report also states Channel *5* "lowers the water table across much of the storage facility property" although Legette, Brashears & Graham does not know the soil conditions on the property. In any case, however, it already has been noted groundwater hydrologic considerations should appropriately be considered together with the surface water conditions which have been documented in the past, and which have resulted in flooding of Buildings "M" and "N."

3. **The Legette, Brashears & Graham report erroneously incorporates the effects of surface water on the water table. Figure 3 of its reportili diätésthë éffëcts on groundwater contours by Channel 5, showing groundwater elevations across the Park Mini Storage site and the eastern part of the Sam's Club site. However, the figure fails to recognize the presence of the three stormwater ponds, and their effects on the groundwater contours. The groundwater contours cross all three ponds, showing changes in water elevation of over 2'/2 feet across Pond 13 alone.** In periods of little or no rainfall, representing "steady state" conditions, water surface elevations in the three ponds should represent the surface expression of the groundwater table at those locations, and the elevations of the three ponds should be essentially equal to one another.

4. **The Legette, Brashears & Graham report concludes with hydrologic modeling to demonstrate flooding of Building "N" could not**

result from the drainage swale, modeling which **failed to recognize the effects of surface water and the adjacent ponds.** Figure 3 of the report earlier failed to recognize the effects of the three ponds which the groundwater elevation contours crossed. The analyses also neglected the effects of surface water entering the swale via the storm inlet at its southern end.

5. **Acting on behalf of Sam's Club, Kimley-Horn Associates, Inc.8 failed to note key concerns regarding the ability of the stormwater retention system to perform according to the original stormwater permit conditions.** The 2004 re-certification was based on a visual examination of the facilities and an as-built survey of the system. We note the following inconsistencies:

a. **The as-built survey noted the severe sedimentation of the westernmost part of Pond 11.** While this would diminish the performance of the underdrain which appears in the original construction plans, its re-certification studies do not acknowledge the presence of the sedimentation and its potential impacts—on the underdrain, and on the storage capacity of the pond.

b. **In any case, however, it appears the underdrain is not present.** The as-built survey states it could not locate the underdrain at the manhole on the public right-of- way. The as-built survey also did not identify the cleanout fitting which the design drawings indicate should be present at the opposite end of the underdrain, along the northern bank of Pond 11.

c. **Kimley-Horn did not note the variances of the pond configurations from the original design.** By replicating the original approach used in performing the stormwater evaluations, these variances have been found to be highly significant to the peak stages achieved by the ponds, and their impacts on Park Mini Storage.

d. **Lastly, Kimley-Horn failed to acknowledge the underdrains of Pond 1 might not meet the original design condition.** The underdrains incorporate a side bank design whose performance cannot be readily verified via visual inspection techniques only. In our own examination of the system, from a remote location, we could not locate all of the pipes which should be present in the system. Lastly, we do not know whether the trees were cut from the side banks of Pond 1 prior to or after the Kimley Horn review. In any case, we believe the root systems of the trees, which had grown to be fairly large, likely damaged the underdrain system.

6. **The MACTEC Engineering and Consulting November 10, 2003 report to Wal-Mart Stores, Inc.16 acknowledged the presence of standing water along the rear of Building "N" of the Park Mini Storage property, but failed to understand its likely source.** The MACTEC report states, "I walked along the swale and saw and photographed standing water and staining along the bottom of the block wall of the

storage units." However, the report notes the problem could not be a surface water issue, stating "There is only a minor amount of water that drains through the swale (rainfall landing in swale)." Instead, the report attributed the standing water to a groundwater problem. The MACTEC report did not recognize flooding of the swale could result when high water conditions in adjacent Pond 13 flowed back through the system, via the 18-inch diameter pipes connecting Pond 13 to the swale.

7. **The onset of retention pond sedimentation, and diminished performance of the underdrains, appear consistent with the reported progressively more-severe flooding of the Park Mini Storage buildings over a period of several years.** When the Sam's Club facilities were first constructed, it is reasonable to assume the facilities should have been closest to meeting the design conditions upon which the original stormwater permitting was based. Through the years, it appears conditions such as sedimentation, and possibly the growth of trees around Pond 1, would reasonably and predictably diminish the performance of the system.

The writer suspects the history of flooding problems should correlate closely to the ability of Park Mini Storage to keep the affected storage units leased. A review of the rental records likely would confirm this correlation.

4.0 LIMITATIONS and CLOSURE

An Association of Engineering Firms Practicing in the Geosciences (ASFE) publication, "Important Information About Your Geotechnical Engineering Report' appears in Appendix B, and will help explain the nature of geotechnical issues. Appendix B: Constraints and Restrictions, highlights the potential concerns and basic limitations inherent to the typical geotechnical engineering report. We hope this report meets your needs and discusses the subject property in a manner appropriate to the conditions noted. We would be pleased to meet with you and discuss further any geotechnical engineering aspects of the claim, and the information presented herein.

APPENDIX M

8/25/2006 Depo Robert Reinhart

0131

IN THE CIRCUIT COURT OF THE SIXTH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA, IN AND FOR PINELLAS COUNTY
CIVIL DIVISION

PARK MINI STORAGE CENTER
COMPANY, a Florida Corporation,

Plaintiff,

v. UCN: 522005CA001123XX—CICI
Ref. No: 05—001123—CI—13

SAM'S EAST, INC., d/b/a SAM'S CLUB,
a foreign corporation doing business
in Florida,

Defendant.

/

VOLUME 2 (pp. 131 - 214)

CONT INUED
DEPOSITION OF: ROBERT REINHART
TAKEN BY: Counsel for Defendant
DATE: August 25, 2006
TIME: 10:11 a.m. to 11:52
a.m.
PLACE: Biller Reinhart Structural
4014 Gunn Highway

Tampa, Florida

REPORTED BY: Karen Kay Skeen, RPR
Notary Public
State of Florida at Large

RICHARD LEE REPORTING
(813) 229—1588
TAMPA: email: rlr@richardleereporting.com ST. PETERSBURG:
100 North Tampa Street, Suite 2060 535 Central Avenue
Tampa, Florida 33602 St. Petersburg, Florida 33701

131

8/2512006 Depo Robert Reinhart

APPEARANCES:
KAREN E. MALLER, ESQUIRE
Powell, Carney, Gross, Maller Ramsay
One Frogress Plaza, Suite 1210
St. Petersburg, Florida 33701
Appeared for Plaintiff
DANIEL F. MOLONY, ESQUIRE
Shook, Hardy & Bacon, LLP
100 North Tampa Street, Suite 2900
Tampa, Florida 33602
Appeared for Defendant

INDEX

PAGE

Examination by Mr. Molony

EXHIBITS

NO. PAGE	DESCRIPTION	
C	Addendum dated 5-1-06	146
D	Sketch by Mr. Reinhart	212

8/25/2006 Depo Robert Reinhart

differential settlement, we were ——

Q Let's wait until we get to Unit –

A Okay.

Q -- M-28, if you don't mind.

A No. But I'm just saying most of this other stuff is just roof leaks, staining. It's the same thing, it's very repetitive.

Q Right. But you mentioned hydraulic pressure. A Correct.

Q You don't have any data whatsoever that would support a conclusion that the water table at Park Mini Storage ever got to a height that it would provide or create hydraulic pressure on the slab at that site. Correct?

A Correct. Now, we obviously have data that the water table has risen under there. And we talked about -- in the previous deposition about water getting underneath the foundations and reducing soil pressure and all of that. But I don't take that data, no.

Q And you don't have any data that would demonstrate to an engineer such as yourself that the water table was ever at a height that it would create hydraulic pressure?

8/25/2006 Depo Robert Reinhart

A Well, I've got physical evidence of water coming up through cracks in the floor and efflorescence, which is the water coming up through the slab. So --

Q Hydraulic pressure doesn't necessarily -- isn't the only explanation for that. Correct?

A Well, water coming up through the slab is the cause for efflorescence on the floor. It's the water migrating from bottom to top.

Q I understand that.

A Correct.

Q But that isn't necessarily from the level of the water table; that could come from wicking up through an existing crack, could it not?

A Well, where is the water coming from then?

Q Through water that seeps under the foundation as it runs on the outside of the building.

A How would it get there?

Q Through all the cracking that you have observed throughout the exterior of the structure.

A But that was water coming in and then

going down. We're talking about water coming from the bottom up. And I'm sure water comes through the

8/25/2006 Depo Robert Reinhart

observed again, soil fines along the base of the wall. Isn't it true that the roof leak could be accountable for the soil fines you found along the base of the north wall?

A Once again, the water would be coming in, so the soil would be coming this way. I don't know how there would be that much soil on the roof.

Q But you wouldn't know?

A No. And I believe this one had the floor stains under the roof leaks, and it also had the moisture staining efflorescence around the cracking on the floor. Let's see. Let's take a look at A-6. Yeah, that's a pretty good one.

Q And, once again, you know, although you see that, you don't have any ability to point to anything for the cause, other than that it's water that you think came up from the ground?

A Water that is coming up from the ground. You have efflorescence. I mean, water is traveling, once again, from the bottom to the top. It's bringing the salts up through the concrete.

Q M-12, no roof leaks. Why didn't you do 9 through 11? You had access to those units.

A Just picking at random again. I mean, there's no particular reason, because it starts to

APPENDIX N

IN THE CIRCUIT COURT OF THE SIXTH
JUDICIAL CIRCUIT IN AND FOR PINELLAS
COUNTY, FLORIDA

PARK MINI STORAGE CENTER COMPANY,

Plaintiff,

vs. Case No. 05-001123-CI-13

SAM'S EAST, INC.,
d/b/a SAM'S CLUB,

Defendant.

DEPOSITION OF
B.J. HICKS

Taken at La Quinta Inn and Suites
900 Southeast Walton Boulevard
Bentonville, Arkansas 72712
June 13, 2006
9:00 a.m.

APPEARANCES:

For the Plaintiff:
Karen Mailer
Attorney at Law
Powell, Carney, Gross,
Mailer & Ramsey, P.A.
One Progress Plaza, Suite

1210

St. Petersburg, Florida

33701

For the Defendant: Daniel F. Molony
Nailah Jaffree
Shook, Hardy & Bacon,
LLP
100 North Tampa Street
Suite 2900
Tampa, Florida 33602-
5810

Blake Greenway
Bentonville Court Reporting
2907 Northaven Drive
Bentonville, Arkansas 72712
(479) 273-9199

6/13/2006 Depo-B.J. Hicks 06-13-06

evaluation?

A They reported back that the water problem was not a result of our drainage area.

Q Okay. So I take it, when Mactec reported back to you, the essence of the report was that the drainage system at the Sam's Club store had not, at least in their opinion as experts, damaged the adjacent property. Is that correct?

A That's correct.

Q Okay. Now, after those two firms inspected and reported back to you that there was no problem that they

observed that had been visited upon the adjacent property owner, is that when Ms. Howell in the real estate department sent yet a third engineering -- or sent yet a third group of folks to the site to inspect and evaluate whether or not there was a problem there that was caused by the Sam's Club store that had damage through flooding the adjacent property? And by that, I'm referring of course to the Kimley and Horne folks that have already been testified about here today.

A I'm not sure when Jamie sent somebody out there. know she did at some point in time after Mactec's evaluation.

Q Okay. and the Jamie you are referring to is Jamie Howell.

6/13/2006 Depo-B.J. Hicks 06-13-06

A Correct.

Q And she at the time, I take it from your testimony,

was employed by Wal-Mart in its real estate department, right?

A Correct.

Q And correct me if I'm wrong -- she, to your recollection, is the individual who originally sent the engineering firm of Kimley and Horne to inspect and evaluate whether or not there was a problem there that was caused by Sam's Club that needed correcting, is that right?

A That's correct.

Q And I take it, after that inspection occurred, you had occasion to discuss a regrading and reshaping of the ditch between the two properties with Ms. Howell. Is that fair?

A Yes.

Q And I take it your opinion was, consistent with the

two reports that you had already received, was that there wasn't any remedial measures or corrective measures that needed to be undertaken at that site. Is that correct?

A Yes, that's correct.

Q And do you on occasion in your position with Wal-Mart have drainage ditches regraded and resodded in the ordinary course of business?

A Oh, yes.

6/13/2006 Depo-B.J. Hicks 06-13-06

Q How frequently is that done in the ordinary course of business at a Wal-Mart store or a Sam's Club facility?

A Typically, we regrade them about every five to ten years.

Q Okay. Now, the decision ultimately to approve the regrading here was yours, is that correct?

A That's correct.

Q If none of the engineering firms that had reported to you had indicated that there was a problem at the Pinellas Park store that was caused in any way by Sam's Club or by Wal-Mart, why did you approve the regrading of the ditch?

A Well, because we had never regraded that ditch, and I made the assumption that at some point in time we would need to, so we might as well do it sooner rather than later.

Q Okay. Was part of your motivation simply to extend an olive branch to the adjacent property owner?

A Absolutely.

Q So in essence, part of the motivation to approve the expenditure on the regrading on the ditch was to be accommodating or be a -- for lack of a better term -- a good neighbor?

A Absolutely.

Q And that's consistent with the type of undertakings

that periodically you do in your role on behalf of Wal-Mart in dealing with adjacent property owners. Is that true?

A Yes.

MR. MOLONY: That's all I have.

MS. MALLER: All right. I have some follow- up.

REDIRECT EXAMINATION BY MS. MALLER:

Q In reference to Aquagenix, again let me ask, did you receive a written report from Aquagenix regarding this drainage?

MR. MOLONY: Objection, asked and answered at least twice.

Q Please answer the question

A Not that I recall.

Q And do you know how long after learning of the complaint by the neighbor that you contacted Mactec?

A I don't know the exact time period

Q In the report that you received from Mactec, do you know who authored that report?

MR. MOLONY: Objection, asked and answered She already testified she doesn't recall.

Q Go ahead and answer.

A I don't recall.

Q Do you know what the date of that report was?

APPENDIX O

3/31/2006 Depo Adel Blassy

0151

IN THE CIRCUIT COURT OF THE SIXTH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA, IN AND FOR PINELLAS COUNTY
CIVIL DIVISION

PARK MINI STORAGE CENTER
COMPANY, a Florida Corporation,

Plaintiff,

UCN: 522005CA001123XX—CICI
vs. REF. NO: 05—001123—CI—13

SAM'S EAST, INC. d/b/a SAM'S
CLUB, a foreign corporation
doing business in Florida,

Defendant.

/

VOLUME2 (pp. 151- 244)

CONTINUED
DEPOSITION OF: ADEL N. BLASSY, P.G.
TAKEN BY: Counsel for Defendant
DATE: March 31, 2006
TIME: 9:50 a.m.
PLACE: Shook, Hardy & Bacon, LLP

100 North Tampa Street
Suite 2900
Tampa, Florida

REPORTED BY: Kimberly Ann Roberts
Notary Public
State of Florida at Large

RICHARD LEE REPORTING
(813) 229—1588
TAMPA: email: rlr@richardleereporting.com
ST. PETERSBURG:
100 North Tampa Street, Suite 2060 535 Central Avenue
Tampa, Florida 33602 St. Petersburg, Florida 33701

3/31/2006 Depo Adel Bassy

APPEARANCES:
KAREN E. MALLER, ESQUIRE
Powell, Carney, Gross,
Maller & Ramsay, P.A.
One Progress Plaza
Suite 1210
St. Petersburg, Florida 33701
Appeared for Plaintiff
DANIEL F'. MOLONY, ESQUIRE
Shook, Hardy & Bacon, LLP
100 North Tampa Street
Suite 2900
Tampa, Florida 33602
Appeared for Defendant

INDEX

PAGE

Examination by Mr. Molony
153

EXHIBITS

NO.	DESCRIPTION	PAGE
I	Survey by C. Fred Deuel	241

3/31/2006 Depo Adel Blassy

A That would not be my place to answer that. You'll have people that own property, people that do maintenance to the property, and they can attest to that since I was not involved with before the spring of 2004.

Q The same with the straight cracks: You have no way of telling how long those have been there. Correct?

A You have to go back and ask the people who do the maintenance, because you're asking me

to give an opinion on a period of time that I was not involved or I had not seen or did not inspect the property.

Q Okay. What I'm asking you is just simply to verify that ——

A I did answer.

Q -- okay. And the water that you have, the moisture that was reflected in those -- in and around those cracks, you have no way of determining with any certainty as to where it came from?

A All the observation that we have seen and based on what we have seen in other sites as from experience, that it seems to be that it's due to intrusion from bottom up, from the groundwater.

Q Okay. Are you able to give an opinion within a reasonable hydrological certainty that that water came from the groundwater table rather than from another source?

3/31/2006 Depo Adel Blassy

A With a relatively high level of confidence, yes.

Q Okay.

A And this is based on the observation. You have -- you have -— I know you're probably looking into finding other source, such as leaking from the roof, such as water going sideways through the vertical walls and flooding the unit, which is —- I don't believe it's the case.

A But basically the observation there is we have units that had leaked through the roof who have observed the same cracks and the same wetness and moisture -- excessive moisture around those cracks in units which there was no leak from the roof.

Q You have units in Building N, do you not, where the expansion joint is sufficiently deteriorated that you can see daylight through the wall?

A Yes.

Q And you have units where the roof leaks sufficiently that you have staining on the floor from the leaks. Correct?

impacted me every time it rains, I don't really need to be an expert to find out there is something wrong here.

Q And you're not one in that area. Correct?

A I just mentioned that you don't need to be an expert to find out if there is an impact. I'm an expert in that area, in the groundwater impact and the hydrogeology, that I have a swale abutting

my property that's directly impacting the groundwater that's causing a rise in the groundwater.

Q And the only proof that you have that it's impacting it is the differential in the elevation of the groundwater from point in time to point in time. Correct?

A Incorrect. That's beside the fact the field observation, the observation of we saw at the slab. That impact, it's obvious, it's clear that it is coming from the groundwater.

Q The only field observation you had is -- that you're referring to is one where you showed that there is moisture near a crack in the foundation? That's the field observation?

MS. MALLER: Objection to form.

A I don't know.

Q And if I were to pose the same series of questions with regard to your conclusions about uplift and so forth in this paragraph that we have inquired about in Building N, I would assume your responses would be the same for Building N?

A Correct.

Q Can you tell me how much hydrostatic pressure from the swale it would take to force water through the floor of the storage units?

A I don't -- I cannot answer that question. It was not —- beyond -- it's not -- was part of our -- our scope of work is basically to see if there is a direct connection or not to the groundwater.

Q It's something that can be calculated, can it not?

A Probably it is.

Q If groundwater is below the bottom of the slab, isn't it true it will not uplift concrete?

A No, it's not true. If it's close enough to the slab, then you have uplifting pressure at the capillary zone. You still have some moisture there that actually can have some impact on the uplift.

Q How much pressure would that water have

APPENDIX P

3/14/2006 Depo Robert Reinhart Vol. 1

0001

IN THE CIRCUIT COURT OF THE SIXTH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA, IN AND FOR PINELLAS
COUNTY
CIVIL DIVISION

PARK MINI STORAGE CENTER
COMPANY, a Florida Corporation,
Plaintiff,
UCN: 522005CA001123XX—CICI
vs. Ref. No: 05—001123—CI—13

SAM'S EAST, INC. d/b/a SAM'S CLUB,
a foreign corporation doing business
in Florida,
Defendant.
/

DEPOS IT ION OF: ROBERT J .REINHART

TAKEN BY: Counsel for Defendant

DATE: March 14, 2006

TIME: 9:00 a.m.

PLACE: Biller Reinhart Structural Group
4014 Gunn Highway
Suite 248
Tampa, Florida

REPORTED BY: Natalie W. Breaux, RPR,
CRR

Notary Public
State of Florida at Large

RICHARD LEE REPORTING
(813) 229—1588
TAMPA: email: rlr@richardleereporting.com
ST. PETERSBURG:
100 North Tampa Street, Suite 2060 535 Central
Avenue
Tampa, Florida 33602 St. Petersburg, Florida 33701

3/14/2006 Depo Robert Reinhart Vol 1

APPEARANCES:
KAREN E. MALLER, ESQUIRE
Powell, Carney, Gross, Maller & Ramsay, P.A.
One Progress Plaza, Suite 1210
St. Petersburg, Florida 33701
Appeared for Plaintiff;
DANIEL F. MOLONY, ESQUIRE
Shook, Hardy & Bacon, L.L.P.
100 North Tampa Street, Suite 2900
Tampa, Florida 33602-5810
Appeared for Defendant.

INDEX

PAGE
Examination by Mr. Molony
3

EXHIBITS

NO.	DESCRIPTION	PAGE
A	Report of Structural Site Investigation done by of Biller Reinhart	10
B	Load table calculations	83

3/14/2006 Depo Robert Reinhart Vol. 1

accumulates along the rear wall of this building goes under the foundation or under the first course of blocks and wicks up into the slab in that fashion?

A I guess my problem is it wasn't raining that day but yet I still had water coming in the units. So I don't know where the water would be coming from except from groundwater.

Q Well, let's look at page 5 under the heading "Conclusions" where you say -- and I quote -- "Water is intruding into the observed storage units in Buildings M and N through the base of the wall (top of concrete slab/foundation" through "the first course of masonry) ." Let's stop there for the moment.

A Okay.

Q Isn't your conclusion that I just read that you have water intruding into Building N through the base of the wall at the top of the slab and under the first course of masonry? Isn't that an opinion that you've given here?

A Well, yes, and there is pictures of it, and there is no standing water outside. So where is that coming from?

Q Well ——

3/14/2006 Depo Robert Reinhart Vol. 1

Q And each of those, I think three elements of information, are all important to that determination. Correct?

A Yeah. Relatively at the beginning, sure.

Q And you haven't -- you don't have any data

A No.

Q --- that would support an opinion that there is a problem with any of those three. Correct?

A Well, just that I've got cracking in my wall and I've got water coming up through my foundation is telling me I've got groundwater underneath my foundations, which tells me my soil—bearing capacity is being reduced.

Q And you don't know whether it has been reduced to a level that it poses any problem at all?

A At this point, no.

Q And you don't have any basis for attributing that water table to anyone other than mother nature. Correct?

A At this point, no.

Q No, you don't?

A I don't.

Q And you haven't been asked, I take it, to

APPENDIX Q

Depo Elizabeth Nash

0001

IN THE CIRCUIT COURT OF THE SIXTH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA, IN AND FOR PINELLAS COUNTY
CIVIL DIVISION

PARK MINI STORAGE CENTER
COMPANY, a Florida Corporation,
Plaintiff,
UCN: 522005CA001123XX—CICI
vs. Ref. No: 05—001123—CI—13

SAM'S EAST, INC. d/b/a SAM'S CLUB,
a foreign corporation doing business
in Florida,

Defendant.

/

DEPOSITION OF: ELIZABETHNASH

TAKEN BY: Counsel for Defendant

DATE: March 9, 2006

TIME: 9:00 a.rn.

PLACE: Richard Lee Reporting
The Alexander Building
535 Central Avenue
St. Petersburg, Florida
REPORTED BY: Natalie N. Breaux, RPR,
CRR

Notary Public
State of Florida at Large

RICHARD LEE REPORTING
(813) 229—1588

TAMPA: email: rlr@richardleereporting.com
ST. PETERSBURG:
100 North Tampa Street, Suite 2060 535 Central Avenue
Tampa, Florida 33602 St. Petersburg, Florida 33701

Depo Elizabeth Nash

APPEARANCES:
KAREN E. MALLER, ESQUIRE
Powell, Carney, Gross, Maller & Ramsay, P.A.
One Progress Plaza, Suite 1210
St. Petersburg, Florida 33701
Appeared for Plaintiff;
DANIEL F. MOLONY, ESQUIRE
Shook, Hardy & Bacon, L.L.P.
100 North Tampa Street, Suite 2900

Tampa, Florida 33602—5810
Appeared for Defendant.
ALSO PRESENT:
Katie Byrd

INDEX

PAGE
Examination by Mr. Molony 3

EXHIBITS

NO.	DESCRIPTION	PAGE
1	Handwritten note	65
2	Composite of Daily Occupancy Reports	95

3/9/2006 Depo Elizabeth Nash

nearest the Sam's property or the other end?

A The other end.

Q All right. Have you -- did you go through your spray and inspect in Building M when it was vacated, with the exception of these three units?

A Excuse me?

Q You indicated that you have a practice of going through a spray and inspection when a unit is vacated. Correct?

A Correct.

Q Did you follow that procedure as you vacated all but three of the units in Building N?

A Probably not, because the reason we get them cleaned up and ready to go is so we can move somebody else in. And when we were moving people out, we couldn't be moving somebody else in.

Q So you don't know if there were any leak problems in Building N?

A That's why we moved people out: It was leaking under the back wall. As people moved out and they emptied their stuff out of the unit and could get to the back, the water was coming underneath the back wall. And at different times after that I seen water come in and under the back wall.

Q And that's your understanding of where the -- to the extent that building had leak problems, based on your personal observation, that's where the problem was coming from?

A Correct.

Q Are there gutters on those buildings?

A They're spotted here and there throughout the facility. I don't know if there is actually gutters on those or not. They don't run solid.

Q How many of the units have you observed in

Building M were leaking under the back wall?

A I don't know how many. Enough to make us not want people in there.

Q Did -- are the only leaks that you observed in Building M those that you attributed to the water coming under the back wall?

A Yes. That's a completely new roof on that building. That was reroofed before we knew we had problems.

Q And that was reroofed when?

A I don't know.

Q Do you recall any tenants complaining about water coming into those units?

A At some time or another they must have because it was brought to our attention, yes.

Q When was the first one?

A I don't know.

Q You can't give me a year?

A I don't know. Like I told you before, I'm not good on time. If I'd have known we were going to come to this point, I'd have been documenting everything.

Q Do you recall any of the tenants in Building N; any of them that you know?

A I've seen hundreds and hundreds of different people. I've rented to hundreds of people over the years. Knowing them personally, no.

Q Well, do you recall the names of any that complained about leaking in the units of that building?

A No.

Q What about Building N? Do you recall any of —-

A People's names? No. I see too many people. I deal with too many people.

Q Did you make -- you observe leaking problems in Building N?

A Yes.

Q Was it leaking under the back wall like

3/9/2006 Depo Elizabeth Nash

you observed in Building M?

A Yes.

Q To the extent you saw leaking problems in Building N, in your estimation, were they caused by water coming in under the back wall?

A Correct.

Q Did you see anything that would indicate that there was a leak source other than from under the back wall?

A He never repaired that roof. That was one that was on the schedule, so there are one or two, maybe three or four. I don't know the number. There are a few that had roof leaks, but the water was coming under the back wall when people were moving stuff out of the unit again. And things aren't wet on the top. They're wet on the bottom towards the back. Again, it's coming in from underneath the wall.

Q So would it be fair to say that in Building N you saw two sources of leaks? In some of the units they had roof leaks; and in other units, maybe the same unit, they had leaks under the back wall. Correct?

A I don't know if it was the same unit or not.

APPENDIX R

[Letterhead] billerreinhart
STRUCTURAL GROUP INC.

Report of Structural Site Investigation

Park Mini Storage
6901 Park Boulevard
Pinellas Park, Florida 33781

Issue Date:
January 23, 2006

BRSG Project No. 06-026

4014 Gunn Highway, Suite 248, Tampa, Florida 33618
Telephone: 813.908.7203 Fax: 813.908. 7303

Letterhead] billerreinhart
STRUCTURAL GROUP INC.

January 23, 2006

Ms. Cara Kessler
c/o Ms. Karen E. Maller, Esq.
Powell, Carney, Gross, Mailer & Ramsey, P.A.
Bank of America Tower
One Progress Plaza
Suite 1210
St. Petersburg, Florida 33701

Subject: **Report of Structural Site Investigation**
Park Mini Storage
Pinellas Park, Florida

Introduction

Robert J. Reinhart, P.E. of Biller Reinhart Structural Group, Inc; (BRSG) performed a visual survey of portions of the Park Mini Storage, located at 6901 Park Boulevard, Pinellas Park, Florida, on Tuesday January 31, 2006. Mr. Adel M. Blassy, P.G. was present during part of the site visit.

The purpose of this project is to review documentation provided by Powell, Carney, Gross, Mailer & Ramsey, PA., observe the current state of the Park Mini Storage facility storage buildings, generate a report to document our findings, and render an opinion regarding the structural integrity of the buildings.

The visual survey by BRSG was of the structures' current states and did not involve any destructive activity to view inaccessible areas. Photographs were taken during the site assessment and are included in Appendix A of this report.

Documentation Provided

The following documentation was provided to and reviewed by BRSG:

1. *Groundwater Evaluation Study* prepared by GeoEngineering, Inc., dated June 7, 2004. The report was prepared for Ms. Cara Kessler.

2. *December 24, 2004 Groundwater Survey Results* prepared by GeoEngineering, Inc., dated January 28, 2005. The report was prepared for Ms. Cara Kessler.

3. *May 21, 2005 Groundwater Survey Results* prepared by GeoEngineering, Inc., dated June 10, 2005. The report was prepared for Ms. Cara Kessler.

4. *November 18, 2005 (Wet-Season) Groundwater Evaluation Study* prepared by GeoEngineering, Inc., dated January 28, *2005*. The report was prepared for Ms. Cara Kessler.

5. *Site Visit to Sam's Club Store No. 6387* prepared by MACTEC Engineering and Consulting, Inc., dated November 10, 2003. The report was prepared for Ms. B. J. Hicks, Wal-Mart Stores, Inc.

6. *Report of Supplemental Geotechnical Services* prepared by MACTEC Engineering and Consulting, Inc., dated December 10, 2003. The report was prepared for Ms. B. J. Hicks, Wal-Mart Stores, Inc.

7. *Geotechnical and Foundation Engineering Study, Sam's Wholesale Club* prepared by Atlanta Testing & Engineering dated January 21, 1991.

8. *Site Plan Bayside Development Mini Storage* drawing sheet Cl prepared by Anderson, Johnson, Parrish, Inc., dated April 16, 1997 with subsequent revisions.

9. *Boundary & Topographical Survey* drawing sheet 1 for Sam's Club at St. Petersburg, FL, prepared by Cumbey & Fair, Inc., dated January 9, 1991:

10. *Grading Plan, Drainage Plan* and *Grading & Drainage Details* drawing sheets 3, 4, 10 and 11 for Sam's Club, prepared by Cumbey & Fair, Inc., dated March 1991 with subsequent revisions.

11. *Sam's Club Swale Re grading* drawing sheets 1 and 2 prepared by Kimley-Horn and Associates Inc., dated-October 12, 2004.

Project Description

The subject facility consists of nine buildings. According to records from the Pinellas County Property Appraiser's Office, construction of the facility was completed in 1980 and Park Mini-Storage Center Co. is the original owner.

During the site visit, our observations were focused at buildings M and N. Buildings M and N are one-story storage structures. Building M is approximately 10 feet wide by 470 feet in length and is located along the north boundary of the property. The structure appears to be constructed of cast-in-place concrete foundations and floor slab on grade (thickened slab edge cast monolithically with the interior floor slab), concrete masonry unit (CMU) exterior walls, and pre-cast pre-stressed concrete hollow core slabs. Load bearing exterior walls are located along the north and south exterior elevations. The load bearing walls support the roof structure and bear on the foundations below. The exterior wall surfaces are finished with stucco. The stucco surfaces are painted.

Building N is approximately 10 feet wide by 315 feet in length and is located along the west boundary of the property. The structure appears to be constructed of cast-in-place concrete foundations and floor slab on grade (thickened slab edge cast monolithically with the interior floor slab), concrete masonry unit (CMU) exterior walls, and pre-cast pre-stressed concrete hollow core slabs. Load bearing exterior walls are located along the east and west exterior elevations. The load bearing walls support the roof structure and bear on the foundations below. The exterior wall surfaces are finished with stucco. The stucco surfaces are painted.

A Sam's Club development is located adjacent to the west of the Park Mini Storage facility. The Sam's Club was constructed circa 1991.

Summary of Site Observations

The readily accessible portions of the exteriors of Buildings M and N were visually observed. Observations made are as follows:

1. Building M along the north boundary of the property and Building N along the west boundary intersect at the northwest corner of the property. Refer to *Figure A-]*.

2. The west elevation of Building N borders along the adjacent property (Sam's Club). A drainage swale is located along the east boundary of the Sam's Club property and abuts the west elevation of Building N. Refer to *Figures A-2, A- 3* andA-4.

3. The north elevation of Building M is adjacent to a retention pond located on 4.

4. "Stair step" cracking (widths from hairline to approximately 1/16") in the CMU wall was observed on the west elevation of Building N and north elevation of Building M. Refer to *Figures A-6, A-7, A-8, A-9* and *A-JO.* Portions of the cracking in the west elevation of Building N appear to have been previously repaired and have re-opened. Refer to *Figure A-9.*

5. Water staining and/or mold and mildew staining was observed along the base of the west elevation of Building N. Refer to *Figure A-8.*

6. Corrosion staining was observed at the stucco expansion joints on the west elevation of Building N. Refer to FigureA-11.

7. One hand excavation test pit was performed along the south elevation of Building N to observe the existing building foundation. The foundation appears to be embedded approximately 9 inches below the existing grade. Refer to *Figure A-12.*

8. "Stair step" cracking (widths from hairline to approximately 1/16") in the CMU wall were observed on the east elevation of Building N. Refer to *Figure A-13.*

9. Access to the individual storage units in Buildings M and N are through metal roll-up doors on the south and east elevations respectively. Refer to *Figure A 13.*

Portions of the interiors of Buildings M and N were visually observed. Observations made are as follows:

Building M

1. Unit M14: Cracking was observed in the concrete floor slab. Moisture was observed along the cracking. Refer to *Figure A-14*.

2. Unit MIS: Random hairline cracking was observed in the floor slab. Efflorescence was observed along and adjacent to the cracking. Refer to *Figure A-15*. Roof leaks were not visibly apparent within the unit.

Building N

1. Unit N12: Cracking propagating east-west was observed in the concrete floor slab along the north interior CMU partition wall. Moisture was observed along portions of the cracking. Refer to *Figure A-16*. Water intrusion was observed along the base of the west wall in the southwest corner. Refer to *Figure A-17*. Random hairline cracking was observed in the floor slab. Moisture was observed along and adjacent to the cracking. Refer to *Figure A-18*.

2. Unit N13: Water intrusion was observed along the base of the west wall and at the wall control joint. *Refer to Figures A-19 and A-20*. Soil fines appear to have infiltrated the unit along with the water.

3. Unit N16: Water intrusion was observed in the unit. Cracking was observed in the concrete floor slab. Moisture was observed along and adjacent to portions of the cracking. Refer to *Figure A-21*.

4. Unit N17: Random hairline cracking was observed in the floor slab. Moisture was observed along and adjacent to the cracking. Refer to *Figure A-22*.

5. Unit N22: Water intrusion was observed in

the unit. Cracking was observed in the concrete floor slab. Moisture was observed along and adjacent to portions of the cracking. Refer to *Figure A-23.*

6. Unit N24: Water intrusion was observed along the base of the west wall and at the wall control joint. Refer to *Figure A-24.* Soil fines appear to have infiltrated the unit along with the water.

7. Unit N25: Cracking propagating east-west was observed in the concrete floor slab. Moisture was observed along portions of the cracking. Refer to *Figure A-25.*

8. Unit N27: Cracking propagating east-west was observed in the concrete floor slab. Moisture was observed along portions of the cracking. Refer to *Figure A-26.* An active roof leak was observed in the unit. Rust-colored staining was observed on the floor slab below the active leak. Refer to *Figure A-26* (right side).

9. Unit N28: Cracking propagating east-west was observed in the concrete floor slab. Moisture was observed along portions of the cracking. Refer to *Figure A-27.*

10. Unit N32: Cracking propagating east-west was observed in the concrete floor slab. Moisture was observed along portions of the cracking. Refer to *Figure A-28.*

Conclusions

Water is intruding into the observed storage units in Buildings M and N through the base of the wall (top of concrete slab/foundation under the first course of masonry), through the lower portions of the masonry wall control joints, up through floor slab cracking and through the roof. Water intrusion through the base of the wall and the lower portions of the masonry control joints is evidenced by the moisture present and the soil fines adjacent to these locations. Water intrusion up through the concrete floor slab is evidenced by the moisture along and adjacent to the cracking and the efflorescence. Efflorescence is caused by soluble salts in cement-based materials (i.e., concrete) brought to the surface by moisture migration. *(4)* Water intrusion through the roof is evidenced by the active leaking observed and the rust-colored staining observed on the floor slab below the leak. Refer to the applicable information and photographs referenced in the text above.

MACTEC Engineering and Consulting, Inc. (MACTEC) performed a site visit to determine if there was a storm water flooding issue causing damage to the Park Mini Storage property. According to the report *Site Visit to Sam's Club Store No. 6387* prepared by MACTEC Engineering and Consulting, Inc., dated November 10, 2003:

1. "The units that MACTEC observed, and photographed, had water or evidence of water seeping in between the concrete slab on grade and the concrete block walls."
2. "...there were no visible signs of water coming through the roofs, except in one of the units."
3. "There is also water coming through cracks in the asphalt pavement in the public storage area."
4. "MACTEC observed the swale and

photographed standing water and staining along the bottom of the block wall of the storage units."

5. "It is our preliminary opinion that the flooding is a ground water problem."

BRSG concurs that the moisture intrusion through the base of the building wall, through the lower portions of the masonry wall control joints and up through floor slab cracking is related to the ground water levels.
MACTEC performed additional geotechnical services to further evaluate the ground 1ater characteristics in the area. According to the *Report of Supplemental Geotechnical Services* prepared by MACTEC Engineering and Consulting, inc., dated December 10, 2003:

1. "So within the Sam's club (sic) property it would be normal to have the groundwater at or above elevation +11 feet in the wet season with occasional flooding to +12 feet"

2. "Typically fill is placed to raise building and paved areas above the anticipated high groundwater levels. This was done for the Sam's Club development. The finished floor of the building is at +14.27 feet and the majority of the pavement is at approximately +13 feet."

3. "...the ground surface elevation at the storage unit site is only +11 to +12 feet."

4. "The natural topography and the groundwater slope downward to the southeast."

5. "Fill appears to have been added to the Storage Unit site, however grades were not raised to the same elevations as the Sam's Club site, and do

not appear to be sufficient for separation from the wet season groundwater levels. In addition, the east end of the Storage Unit property is lower in elevation than the western end."

6. "The major drainage feature for the area is the ditch leading to Cross Bayou located on the eastern end of the Storage Unit property."

7. "It is likely that increased development has resulted in increased flows into this ditch, while at the same time vegetative growth and siltation has decreased the capacity of the ditch. These two events have resulted in increasing groundwater levels and more frequent flooding of low properties adjacent to the ditch than may have occurred years earlier."

Drawings prepared by Kimley-Horn and Associates, Inc., depict the regrading of the swale along the east edge of the Sam's Club property abutting the west boundary of the Park Mini Storage facility. According to the studies by GeoEngineering, Inc., the groundwater levels within the Park Mini Storage facility appear to have decreased somewhat after the reconfiguration of the swale.

The increased groundwater levels within the Park Mini Storage facility most likely have negatively affected the structural integrity of the buildings, particularly the foundations, as follows:

1. The soil strength or soil bearing pressure is typically reduced below the groundwater table. (2)

2. A rise in the water table from a depth greater than the effective width of the foundation up to the bottom of the foundation has the effect of

reducing the soil bearing capacity of a sandy soil to approximately one half its value for moist, dry or saturated sand.

3. Foundations that are located below the groundwater table will be uplifted by the water pressure. (2)

4. Efflorescence results from the leaching of water-soluble salts and/or calcium hydroxide (hydrated lime) in concrete by moisture migration. Concrete exposed to continuing leaching and loss of some of its components becomes a cause for concern, not only because its strength is reduced, but its porosity is increased which facilitates further entry of water. (3) Typical causes for cracking in CMU walls and concrete are as follows:

1. Stress due to applied loads.
2. Stress due to drying shrinkage or temperature changes.
3. Settlement and/or differential settlement of building foundations.

BRSG does not believe the cracking observed in the CMU walls and the concrete floor slabs has been caused by applied loads. Due to the increased groundwater levels within the Park Mini Storage facility, settlement and/or differential settlement due to reduced soil bearing capacity can not be discounted as a cause for some of the cracking observed in the CMU walls and the concrete floor slabs. Portions of the CMU wall cracking appear to have been previously repaired and have reopened, thus indicating that settlement and/or differential settlement may be an ongoing condition that is affecting the structures.

Neither the survey nor this report is intended to cover hidden defects, mechanical, electrical, or architectural features, nor environmental concerns. Unauthorized use of this report, without the permission of BRSG, shall not result in any liability or Legal exposure to Biller Reinhart Structural Group;-Inc.

Biller Reinhart Structural Group, Inc. reserves the right to update the information contained in this report if deemed necessary due to modified site conditions or the availability of new/additional information.

Thank you for offering us the opportunity to provide our services for this project. Please contact our office if you have any questions regarding this report.
Sincerely,

Biller Reinhart Structural Group, Inc.
State of Florida Certificate of Authorization No. 9149

Robert J. Reinhart, P.E.	Michael H. Biller,
P.E. Vice President	President
Florida P.E. No. 50076	

References

1. Peck, Ralph B., Hanson, Walter E. Thornburn, Thomas H. (1974). *Foundation Engineering*. John Wiley & Sons, Inc., New York.
2. Bowles, Joseph E. (1988). *Foundation Analysis and Design*. McGraw- Hill Book Company, New York, NY.
3. Newman, Alexander (2001). *Structural Renovation of Buildings*. McGraw-Hill, New York, NY.
4. Randall, Frank A., Panarese, William C. (1990). *Concrete Masonry Handbook for Architects, Engineers, Builders*. Portland Cement Association, Skokie, IL.

Appendix *A*
Photographic Documentation

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 1

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 2

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure-A-3

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 4

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 5

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 6

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 7

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 8

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 9

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 10

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 11

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 12

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 13

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 14

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 15

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 16

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 17

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 18

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 19

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 20

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 21

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 22

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 23

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 24

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 25

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 26

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 27

[PHOTOGRAPHIC IMAGE OMMITTED]

Figure A- 28

APPENDIX S

[Letterhead]GeoEngineering, Inc
Environmental Engineering Consultants

June 10, 2005

Ms. Cara Kessler
Park Mini Storage
6901 Park Boulevard
Pinellas Park, Florida 33781

RE: May 21, 2005 Groundwater Survey Results
Groundwater Evaluation Study
Park Mini-Storage
6901 Park Blvd.
Pinellas Park, Florida
GEI Project Number 10E040602--3

Dear Ms. Kessler:

GeoEngineering, Inc. (GEI) has completed a third (3^{rd}) groundwater elevation survey study at the Park Mini Storage facility, located at 6901 Park Boulevard, Pinellas Park, in Pinellas County, Florida. This round of groundwater elevation survey was conducted on May 21, 2005. The results of our survey findings and conclusions are presented in this report.

Investigation Background

Park Mini Storage is a public self storage rental facility. GeoEngineering, Inc. (GEI) was retained by the facility owner/operator to conduct a groundwater investigation concerning water damage occurred in several of the rental units located along the property boundary with the abutting Sam's Club property. Three (3) groundwater surveys were conducted at the facility for the period between May 2004 to May 2005.

The first round of groundwater elevation survey, representing the end of the dry season, was conducted by GEI on May 27, 2004. A copy of the GEI's June 7, 2004 report representing the results of the first groundwater survey is attached in Appendix B of this letter report. The second round of groundwater elevation survey representing the end of the wet season was conducted on December 24, 2004. The result of the second survey was presented in GEI's report dated January 28, 2005, and a copy of the report is provided in Appendix A of this report. The third round of groundwater survey is presented in this letter report.

Based on the findings provided in GEI's June 7, 2004, first survey report; it appears that Sam's Club conducted a regarding and reconfiguration of the drainage swale that abuts the Park Mini Storage property. The results of the second groundwater elevation survey (December 24, 2004), indicated that the regarding and configuration of the drainage swale by Sam's Club may have positive impact on controlling seepage of surface storm water into the groundwater. Evaluation of the groundwater survey results indicated that the drainage swale on Sam's Club property is acting as a recharge to the groundwater on the Park Mini Storage property.

Current Groundwater Survey Results

The current groundwater elevation survey was conducted on May 21, 2005. This third survey represents the end of 2005 dry season. Evaluation of this survey data indicates that the local groundwater, generally, follows the layout of the ground (land) surface. The groundwater flow direction is from west to east (i.e. from Sam's Club on the western boundary, and moving down gradient (to the east) towards the creek that runs along the eastern boundary of the Park Mini Storage property.

A summary of the current groundwater elevation survey conducted on May 21, 2005, is shown in the next table.

Table I
Groundwater Elevation Survey Summary
May 21, 2005

Piezometer Number	Top of Casing Elevation (ft.)	Depth to Groundwater from Top of Casing (ft.)	Groundwater Elevation (ft.)
Pz-1	12.22	4.15	**8.07**
Pz-2	12.29	4.00	**8.29**
Pz-3	12.08	3.30	**8.78**
Pz-4	13.06	4.90	**8.16**
Pz5	11.92	4.00	**7.92**
Pz-6	9.94	5.40	**4.54**
Pz-7	11.39	3.65	**7.74**
Pz-8	11.76	8.10	**3.66**
Pz-9	11.11	6.05	**5.06**
Pz-10	11.81	4.02	**7.79**

The results shown in the above table is presented in the Groundwater Elevation Map, Figure 1 of this letter report. A comparison of the three-groundwater elevation surveys conducted from May 2004 through May 2005 is presented in Table 2 below.

Table 2
Comparison of Groundwater Elevation Surveys

Evaluation of the current groundwater elevation surveys results along with comparison of the previous two-groundwater elevation survey events indicates the following facts:

- The first survey was conducted on May 27, 2004, at the end of the dry season. Groundwater elevations in observation wells abutting the property boundary with Sam's Club (PZ-1, PZ-2, PZ-3, and PZ-4) were 8.81, 9.18, 9.48, and 9.16 feet, above sea level, respectively.

Piezometer Number	**Groundwater Elevation May 27, 2004 (ft.)**	**Groundwater Elevation December 24, 2004 (ft.)**	**Groundwater Elevations May 21, 2005 (ft.)**
Pz-1	8.81	↓8.37	↓ 8.07
Pz-2	9.18	↓8.79	↓ 8.29
Pz-3	9.48	↓9.18	↓8.78
Pz4	9.16	↓8.86	↓8.16
Pz-5	8.22	↓8.42	↓7.92
Pz-6	4.98	↓ 5.64	↓ 4.54
Pz-7	8.29	↓ 8.09	↓7.74
Pz-8	4.86	↓5.16	↓3.66
Pz-9	5.81	↓5.91	↓5.06
Pz-10	8.01	↓7.81	↓7.79

- GEI's Report dated June 7, 2004, recommended that Sam's Club should reevaluate the design of the storm water drainage swale along the boundary with

Park Mini Storage. During a conference call on June 24, 2004, between Ms. Susan Motley, legal counsel along with representatives from Kimberely Horne Engineering Firm representing Sam's Club; and Ms. Cara Kessler (property owner), Ms. Karen Mailer, counsel along with Adel Blassy of GeoEngineering, representing Park Mini Storage; GeoEngineering report results were discussed. The report indicated the direct impact of the storm water retained in the drainage swale on Sam's Club causing a rise in the groundwater levels at the property boundary. Hence, causing seepage and damages to the concrete slab in the storage units as well as the asphalt in the areas abutting Sam's Club property.

- In the fall of 2004, Sam's Club re-graded and re-configured the design for the drainage swale on Sam's Club property along Park Mini Storage property boundary.

Groundwater Survey
May 21, 2005
Park Mini Storage, Pinellas Park, FL
Page 4 of 4

- The second survey was conducted by GEI on December 24, 2004. Groundwater elevations in observation wells PZ-1 through PZ-4 along the property boundary with Sam's Club Were 8.37, 8.79, 9.18, and 8.87 feet above sea level, respectively. Table 2 shows these elevations to be lower (↓) than those measured during the May 27, 2004 survey in the same wells.

- It must be noticed that the rainy season for the local area is the summer and fall. Thus the December 2004 survey was shortly after the rainy season ended. One would expect that groundwater elevation to rise in the observation wells during this period in comparison to water levels during the dry season (May 27, 2004, survey). However, Table 2 above indicates that water levels in observation wells (PZ-1 through PZ-4) located along the boundary with Sam's Club actually show a lowering (↓) instead of rising (↑) in the water table elevation in these wells. While as expected, wells located down gradient, by the creek along the eastern property boundary show the expected rise (↑) in water table levels.

- The current groundwater elevation survey (May 2005) represented the end of the 2005 dry season. During the dry season period the groundwater levels should be lower than that of the wet season. As indicated in Table 2 above, the groundwater elevation indeed was lowered (↓) in all of the observation wells.

CONCLUSIONS

Based on our findings GeoEngineering, Inc. concludes that the current survey results confirm the results of GEI previous reports dated June 7, 2004 and January 28, 2005. And that the drainage swale for Sam's Club which abuts the Park Mini Storage property was faulty designed, and had negative impact on the groundwater along the property boundary. Water seepage and damages to most of the storage units and asphalt surface located along the Sam's Club property boundary were observed during our original survey. At present, it seems that the corrective action to re-grading and reconfiguring the Sam's Club drainage swale, may have worked in a positive way in controlling seepage.

Should you have a question, please do not hesitate to contact me at (813) 988-8600.

Sincerely;
GeoEngineering, Inc.
/S/
Adel M. Blassy, PG.
Principal Hydrogeologist
Florida License PG 1834

APPENDIX T

3/22/2005 Depo-Adel Blassy 03-22-05

IN THE CIRCUIT COURT OF THE SIXTH
JUDICIAL CIRCUIT, STATE OF FLORIDA
IN AND FOR PINELLAS COUNTY
CIVIL DIVISION

PARK MINI STORAGE CENTER
COMPANY, a Florida Corporation,
Plaintiff,

CASE NO: 05--1123—CI—13

vs.

SAM'S EAST, INC. d/b/a SAM'S CLUB,
a foreign corporation doing business
in Florida,
Defendant.

/

DEPOSITION OF:	ADEL M. BLASSY, PG
TAKEN:	By Counsel for Defendant
DATE:	March 22, 2005
TIME:	4:00 p.m.
PLACE:	Richard Lee Reporting 100 North Tampa Street Suite 2060 Tampa, Florida
REPORTED BY:	Kimberly Ann Roberts Notary Public State of Florida at Large

RICHARD LEE REPORTING

(813) 229—1588

TAMPA: email: rlr@richardleereporting.com
ST. PETERSBURG:
100 North Tampa Street, Suite 2060 535 Central Avenue
Tampa, Florida 33602 St. Petersburg, Florida 33701

3/22/2005 Depo-Adel Blassy 03-22-05

APPEARANCES:
KAREN E. MALLER, ESQUIRE
Powell, Carney, Gross
Maller & Ramsay
Bank of America Tower
One Progress Plaza
Suite 1210
St. Petersburg, Florida 33701
Appeared for Plaintiff
DANIEL F. MOLONY, ESQUIRE
- and -
KEVIN KUCHARZ, ESQUIRE
Shook, Hardy & Bacon, LLP
100 North Tampa Street
Suite 2900
Tampa, Florida 33602
Appeared for Defendant

INDEX

PAGE

Examination by Mr. Molony
3

EXHIBITS

NO.	DESCRIPTION	PAGE
A	Copy of composite of photographs at site	38
B	June 7, 2004 field study report	61
C	Site map dated April 16, 1979	34
D	Letter dated 11/10/03 and fax cover page	35
E	January 28, 2005 field study report	61
F	Kimley-Horn drawings and cover letter	148
C	Composite of Mr. Blassy's file	148
H	Composite of documents in three-ring binder	148

3/22/2005 Depo-Adet Blassy 03-22-05

The deposition, upon oral examination, of ADEL M. BLASSY, PG, taken by counsel for Defendant, on the 22nd day of March, 2005, at Richard Lee Reporting, 100 North Tampa Street, Suite 2060, Tampa, Florida, beginning at 4:00 p.m., before Kimberly Ann Roberts, Notary Public, State of Florida at Large.

* * * * * * * * * * *

ADEL N. BLASSY, PG,

being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MOLONY:

Q Good afternoon, sir.

A Good afternoon.

Q My name is Dan Molony, and I' m here representing Sam's Club East. And, first of all, I would be curious as to whether you' ve been deposed before

A Yes.

Q On approximately how many occasions?

A Several, but never actually been — went to court. Ended up settling out.

Q Well, just very briefly, what I' m going to be doing over the course of the afternoon obviously is asking you a series of questions; and if you don't understand a question as I pose it, I'll count on you to tell me that before you respond. Is that fair?

A Fair.

Q So that if you respond to a question, I'll take that as an indication from you that you understand the question before you responded. All right?

A Correct.

Q And let's try and let the question get out so that we're not talking over each other, and everything will be fine. Is that okay?

A Sure.

Q If you need a break, tell me that too, because I'm not trying to cause you to have any durational effort here. So tell me that as well. Okay?

A Absolutely.

Q If you would, sir, tell me your current business address.

A GeoEngineering, Inc. is located at 10940 North 56th Street. That's in Temple Terrace or Tampa, Florida.

3/22/2005 Depo-Ad& Blassy 03-22-05

Q And is that the entity by which you're employed?

A That's correct.

Q And in what capacity are you employed there, sir?

A I am the president and principal hydrologist --or the hydrogeologist -- for GeoEngineering.

Q For how long has GeoEngineering been in business?

A Since July of 1996.

Q So your firm of which you are a principal has been engaged in the business of environmental engineering roughly nine years?

A Correct.

Q Would you please give us your educational experience post high school, sir?

A Post high school. I have a bachelor degree in geology -- major in geology with minors from a university overseas.

Q Which one?

A Al—Fateh University or Tripoli University. It's known as Tripoli University.

Q Tripoli --

A Yes.

3/22/2005 Depo-Adel Blassy 03-22-05

Q T-r-i-p-o-l-i?

A Correct.

Q All right.

A That's main -- my major was geology, and I have minors in hydrogeology and geophysics. Then after that, I worked as a hydrogeologist for three years, and then I came to the U.S. and I worked -- I did my master's degree at Ohio University in Ohio. I have a master's degree in hydrogeology with a minor in engineering geology --

Q A minor -- Ivm sorry —- a minor in what?

A Engineering geology.

Q Okay.

A And computer modeling.

Q All right. Let's back up a second. When did you -- when did you get your undergraduate degree?

A 1977.

Q And when did you -- you began working for three years before -—

A As a hydrogeologist.

Q Where did you begin that work?

A Department of soil and water at Tripoli in Tripoli, Libya.

Q All right.

3/22/2005 Depo-Adel Blassy 03-22-05

MS. MALLER: Let him finish his question before you answer because it makes it very tough for the court reporter.

THE WITNESS: Okay.

MS. MALLER: I know you have a tendency to want to answer, but let him finish.

BY MR. MOLONY:

Q All right. So you would have left Libya in about 1980?

A 1980.

Q And come to the United States at that time?

A Correct.

Q Did you come here to go to school or to begin working?

A No. To go to school.

Q And thatTs when you went to Ohio University?

A Correct.

Q You obtained amaster's from them in hydrogeology. Right?

A Correct.

Q Do you have any additional post-graduate degrees?

A Yes.

3/22/2005 Depo-Adel Blassy 03-22-05

Q In what?

A Ph.D. work all the way through -- the only thing I did not do is the -- I did not defend my dissertation, the final —— so I did all the course requirements for the Ph.D. I did the oral exam, everything else, including the thesis. The only thing, I did not defend the final dissertation.

Q You're going to have to -- I'm not --

A Sure.

Q -- in that realm. Do you have to defend your dissertation in order to be awarded the Ph.D. degree?

A Correct.

Q So you did the coursework, but they didn't award you a Ph.D.?

A That's correct.

Q All right. So the last degree that was awarded to you was your master's?

A Master's degree.

Q All right. Now, when you finished studying at Ohio University, that's the last formal education that you had, degree-seeking -- is that right? -- or is there subsequent education?

A No. The Ph.D. was also in hydrogeology. The Ph.D. coursework is all in hydrogeology and

3/22/2005 Depo-Adel Blassy 03-22-05

engineering geology.

Q Was that at Ohio University or --

A That was at Kent State University.

Q Okay. I didn't catch that. I apologize.

A Okay.

Q All right.

A And I attended Kent State from 1983 through 1987.

Q Did you have any formal education, degree-seeking type of education, after 1987, or was that the end of it?

A Formal, no. Mostly courses or seminars and things like that, which actually I ended up teaching those seminars.

Q Okay. Now, after you left Kent State in 1987, where were you first employed, and in what capacity?

A State University of New York, Buffalo.

Q In what year, sir?

A In 1987. I left Kent State in August, and I joined -- actually the end of August I joined SUNY Buffalo, State University of Buffalo, Department of Geology as Assistant Professor of Hydrogeology.

Q Assistant professor in '87, and you

continued in that --

A For two and a half years.

Q Okay. So you're up to almost 1990. Correct?

A Correct. The end of 1990, December of 1990 or -- yeah.

Q All right. What did you do in 1990? Did you leave the State University --

A I resigned --

Q —- system in New York?

A I'm sorry.

Q That's okay.

A I did resign from the State University of New York because I had another offer from one of the largest consultant firms in world at the time, IT Corporation, International Technology Corporation. And I was hired as the head of hydrogeological section at IT out of their biggest office, which was Monroeville or Pittsburgh -- suburb of Pittsburgh, Pennsylvania.

Q All right. So you left your job at the university, took a position with IT Corp. heading up the hydrogeological section of IT Corp. in a suburb of Pittsburgh, Pennsylvania. Is that correct?

A Yeah. Monroeville, to be exact.

Q All right. And how long did you work there, sir?

A About a couple of years -- about a year and a half or so -- between a year and a half to two years.

Q Well, what were your duties at IT Corporation, generally speaking? What did you do there?

A I headed a group of doing -- group of geologists and engineers to do specifically computer modeling of groundwater flow, hydrological studies. Mainly -- my main contract was with the Department of Energy.

Q So you did computer modeling of groundwater flow, generally speaking. Is that what you did there?

A Yes. And hydrological studies. PPG, for example, Pittsburgh Paint, Glass, this was one of my other clients. We did almost all of their facilities throughout the U.S.

Q All right. You did that for, I think you said ——

A A couple of years.

Q -- a couple of years. What did you do next?

3/22/2005 Depo-Adel Blassy 03-22-05

A I ended up coming to Florida. I was giving a seminar in Florida, and I left -- Pittsburgh was so cold. I came down here. It was 80 degrees and it was in February. So I gave a three-day seminar in hydrogeology, went back and submitted -- I requested a transfer to a warmer climate. Our company -- IT had 48 offices nationwide, and I requested to move to California or Florida. While we were in this process, my general manager became a vice president for another corporation, and he said, "I have a position in Florida, and I want you to start opening a group for me down in Tampa," which I accepted.

Q A group for him?

A Yeah, a group. Basically an engineering group. Atec and Associates is the name of the firm.

Q How do you spell that, sir?

A A-t-c-e --

Q A-

A A—t-e-c. Atec and Associates.

Q Okay.

A The headquarters is out of Indianapolis. We had about 60 offices nationwide. They had a group here in Tampa, but it was not doing too well,

3/22/2005 Depo-Adel Blassy 03-22-05

and they needed somebody to head that group.

Q Okay.

A And I was retained to basically jump-start the group back again, and that's when I moved to Tampa.

Q And this was in '90 -- when?

A '91.

Q For how long did you work with Atec and Associates?

A For about three years.

Q So you're up to what time frame, sir?

A Nineteen -— I know I left them in 1993.

Q And what did you do while you were at Atec and Associates from a professional perspective?

A I was heading the environmental group for Atec. Our main jobs was basically environmental assessment, hydrological studies. That's in Tampa.

Q Okay. And what was your -- what was your reason for leaving there?

A Another -- PSI, Professional Service -- I did not go -- agree with the general direction that the company was going with, and another national firm contacted me, and they wanted me to start a group similar to the group I started at Atec. And they made an offer. It was sweet

3/22/2005 Depo-Adel Blassy 03-22-05

enough that made me make the move to PSI, Professional Service Industries, which I'm sure you see all of their trucks all over 1-4.

Q You started with them in '93?

A In '93 to -- through '95.

Q What did you do for them?

A Same thing we did at Atec. Basically I was the head of the environmental group for them, and, again, it will be in environmental site assessments, hydrogeological studies, remediation.

Q Okay. What did you do after you left?

A For a period of about six months I became a VP for a small firm out of Orlando -- it's called GC, Geotechnical Consulting International -- based on the fact that I would be becoming a partner with them. And when it did not materialize within six months, I opened my own firm, GeoEngineering.

Q Did they give you any explanations why they didn't make you a partner after six months?

A No. They -- I wanted to buy in for a certain amount, and the -- I know I was bringing so much business to them, and it was not a fair deal. So I said, "Okay. Why should I do it?"

Q So did you leave them in the six-month period that you're talking about there, or that

3/22/2005 Depo-Adel Blassy 03-22-05

would have concluded when, sir?

A As -- July -- end of July 1996.

Q What did you do after you resigned that position?

A GeoEngineering.

Q You started your own company?

A That's correct.

Q You started your own firm?

A GeoEngineering. Correct.

Q And is the nature of the work that you have done since 1996 at GeoEngineering, Inc. the same or similar to that which you have done since you left —-

A Correct.

Q --SUNY in 1990?

A Correct.

Q You don't have a degree in professional engineering. Correct?

A No, I'm not an engineer.

Q Correct. And have you ever designed a stormwater drainage system for a commercial site?

A Yes, we have.

Q Okay. Have you ever done that?

A No. Under my supervision. It's because storm drain requires hydrological parameter. It has

3/22/2005 Depo-Adel Blassy 03-22-05

to go into the calculations.

Q Okay.

A And which we do provide. That's the portion where we do the treating infiltrations, the calculations, and basically, unfortunately, we need a PE to sign off on it. And that's basically what happens.

Q Okay. So a professional engineer has to sign off on that. The role, if I'm understanding you correctly, of a hydrogeologist in that type of project is to provide the mathematical component of the volumes of water that could be handled through a system that's being designed. Is that essentially correct?

A Correct. In addition to actually qualify and quantify the parameter, the characteristic ofthe soil, how absorbent it is, how fast the surface water that's sitting in the retention pond -- how fast it's percolating and going into the groundwater, this is all related to my area of expertise.

Q Amount of water, how much it moves, how fast it moves, that's the area of your involvement in -- and people like you, hydrogeologists --

A Correct.

3/22/2005 Depo-Ad& Blassy 03-22-05

Q -- in formulating what is an appropriate stormwater drainage system. Am I correct?

A Correct.

Q But you give that information to a professional engineer, who then takes your calculations, designs a system, and then signs off on it using the math that you have provided. Is that essentially correct?

A The field data provided, correct. Actually we could -- of course, because of experience, you can do the whole thing, and basically you end up giving it to them to review, sign off on it.

Q You signed a report that we have seen in this case indicating Florida license P01834.

A Correct?

Q Is that the number of your license as a professional hydrogeologist?

A Professional geologist.

Q Okay. That's what the designation stands for?

A The designation stands for PG, Professional Geologist.

Q All right. When did you obtain that license, sir?

APPENDIX U

3/22/2005 Depo-Adel Blassy 03-22-05

IN THE CIRCUIT COURT OF THE SIXTH
JUDICIAL CIRCUIT, STATE OF FLORIDA IN
AND FOR PINELLAS COUNTY CIVIL DIVISION

PARK MINI STORAGE CENTER
COMPANY, a Florida Corporation,
Plaintiff,
CASE NO: 05—1123--CI—13
vs.

SAM'S EAST, INC. d/b/a SAM'S CLUB,
a foreign corporation doing business
in Florida,
Defendant.
/

DEPOSITION OF:	ADEL M. BLASSY, PG
TAKEN:	By Counsel for Defendant
DATE:	March 22, 2005
TIME:	4:00 p.m.
PLACE:	Richard Lee Reporting 100 North Tampa Street Suite 2060 Tampa, Florida
REPORTED BY:	Kimberly Ann Roberts Notary Public State of Florida at Large

RICHARD LEE REPORTING

(813) 229—1588

TAMPA: email: rlr@richardleereporting.com
ST. PETERSBURG:
100 North Tampa Street, Suite 2060 535 Central Avenue Tampa, Florida 33602 St. Petersburg, Florida 33701

3/22/2005 Depo-Adel Blassy 03-22-05

APPEARANCES:
KAREN E. MALLER, ESQUIRE
Powell, Carney, Gross Maller & Ramsay
Bank of America Tower
One Progress Plaza Suite 1210
St. Petersburg, Florida 33701
Appeared for Plaintiff
DANIEL F. MOLONY, ESQUIRE
- and –
KEVIN KUCHARZ, ESQUIRE
Shook, Hardy & Bacon, LLP
100 North Tampa Street
Suite 2900
Tampa, Florida 33602
Appeared for Defendant

INDEX

PAGE

Examination by Mr. Molony
3

EXHIBITS

NO. DESCRIPTION
PAGE

A	Copy of composite of photographs at site	38
B	June 7, 2004 field study report	61
C	Site map dated April 16, 1979	34
D	Letter dated 11/10/03 and fax cover page	35
E	January 28, 2005 field study report	61
F	Kimley-Horn drawings and cover letter	148
G	Composite of Mr. Blassy's file	148
H	Composite of documents in three-ring binder	148

3/22/2005 Depo-Adel Blassy 03-22-05

support any opinion as to whether any water from that ditch ever seeped into a building on the Park Mini Storage site. Correct?

MS. MALLER: Object to form.

A Seeping into a building, your statement is correct. However, I give and I render my professional opinion based on the fact that this source of water in the groundwater, the swale is up gradient and it's the recharge, and it's the source of contributing to the immediate vicinity of the well that -- immediate vicinity of the property boundary that caused the water to rise. And after Sam's Club have corrected and reconfigured, this have been reflected in our second report, the January report, that actually there is an impact. And we stated it is a positive impact because the configuration that have taken place.

Q Yes. It's gotten even better than it was before. Correct?

MS. MALLER: Object to form.

BY MR. MOLONY:

Q You're two and a half to three feet below surface. A During dry season. You have to quantify that. If you don't quantify or you don't qualify

APPENDIX V

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR PINELLAS COUNTY CIVIL DIVISION

PARK MINI STORAGE CENTER COMPANY, a Florida corporation,

Plaintiff,

v.

SAM'S EAST, INC. d/b/a SAM'S CLUB, a foreign corporation doing business in Florida,

Defendant.

UCN:522005CA001123XXCI CI
Ref.No.: 05-001123-CI-13

_______________________________________/

FIRST AMENDED COMPLAINT FOR DAMAGES

COMES NOW, Plaintiff, PARK MINI STORAGE CENTER COMPANY, a Florida for profit corporation, by and through its undersigned counsel sues Defendant, SAM'S EAST, INC., a foreign corporation doing business in the State of Florida as SAM'S CLUB, and Plaintiff alleges:

GENERAL ALLEGATIONS APPLICABLE TO ALL COUNTS

1. Plaintiff is a for profit Florida corporation with a business location at 6901 Park Boulevard, Pinellas Park, Florida.

2. Defendant is a foreign corporation doing business as SAM'S CLUB with a physical business location at 7001 Park Boulevard, Pinellas Park, Florida.

3. Plaintiff operates a storage facility in which it rents storage units and space to businesses and individuals. There are various size storage units available for rental purposes, as well as paved areas that can be rented for purposes of storing boats and other recreational vehicles (herein after referenced as "storage facility").

4. The Plaintiff's storage facility has been in operation since approximately 1980.

5. In approximately May 1993, Defendant commenced construction of a SAM'S CLUB warehouse store on the property immediately adjacent to the property for which the Plaintiff's storage facility is located in Pinellas Park.

6. The Plaintiff began to experience extensive water damage to its storage facility, and could not determine the cause.

7. Plaintiff retained an expert to investigate the water damage issue to determine the cause of the water intrusion which has caused extensive damage to Plaintiff's storage facility.

8. The initial investigation completed in June of 2004, has confirmed that the extensive water damage is the result of drainage from the Sam's Club facility owned by Defendant, that has negatively

impacted the groundwater in the immediately surrounding area, resulting in the pressure of the groundwater causing physical damage to the storage facility belonging to the Plaintiff, which is immediately adjacent to the Defendant's property.

9. The Defendant has refused to acknowledge its responsibilities for the water damage being caused to the Plaintiff's storage facility, however in the latter part of 2004 the Defendant took action to correct the drainage.

10. By the time the Defendant ultimately took action to correct the drainage issue on its property adjacent to the Plaintiff's storage facility, extensive physical damage had already been caused to the Plaintiff's storage facility.

COUNT I - NEGLIGENCE

11. Plaintiff realleges paragraphs 1 through 10 as if fully set forth herein.

12. It was reasonably foreseeable to the Defendant that its failure to account for the effect of the drainage system on its property would have a negative impact on the surrounding property owners, including Plaintiff's storage facility.

13. The Defendant therefore owed a duty to Plaintiff to see that the drainage system did not adversely affect the groundwater in a manner so as to cause injury to Plaintiff's storage facility.

14. Defendant failed to use due care in that the Defendant has impacted the groundwater levels to such an extend that it has negatively impacted Plaintiff's storage facility.

15. As a result of Defendant's actions, excessive and unnecessary quantities of water were

diverted to the adjacent property, directly and proximately causing the damage to Plaintiff's storage facility to the extent that a portion of Plaintiff's storage facility must be rebuilt, which has been identified as buildings M and N located closest to the Defendant's property, as well as the area where the boat/rv storage is located.

16. These damages include approximately $535,000.00 for the reconstruction of the units which includes design, engineering and permitting, general site conditions, site work, paving and demolition, and new building construction as well as other miscellaneous costs and overhead profit.

17. There is also the loss of income to the Plaintiff until the units are rebuilt which is estimated to be a little over $177,971.58, based upon loss of storage units in Building M and N, as well as the RV/Boat Storage Area, which calculations are set forth in subparagraphs (a), (b), and (c) below.

a. Estimated damages for Building M include the following:

i. Fifty-two (52) storage units (7 ½ feet by 10 feet). These units rent out for $47.05 per month. $47.05 x 52 = $2,446.60. The yearly loss of income on these fifty-two (52) units is $29,359.20 which multiplied by 3 years equals $88,077.60.

ii. One (1) unit (10 feet by 20 feet) at $90.95 per month times 12 months equals $1,091.40.

The loss of income for this unit over a 3 year period is $3,274.20.

iii. Two (2) units (10 feet by 30 feet) at a monthly cost of $140.80 times 12 months equals $3,379.20. The loss of income for these units over a 3 year period is $10,137.60.

iv. The total of the above figures is $101,489.40. However, my client has applied a vacancy ratio of 10%, which is the standard percentage used in the industry, which brings the total amount of the loss of income to $91,340.46.

b. Estimated damages for Building N include the following:

i. Fourteen (14) storage units (7 ½ feet by 10 feet). These units rent out for $47.05 per month. $47.05 x 14 = $658.70. The yearly loss of income on these fourteen (14) units is $7,904.40, which multiplied by 3 years equals $23,713.20.

ii. Nineteen (19) storage units (10 feet by 10 feet). These units rent out for $52.65 per month. $52.65 x 19 = $1,000.35. The yearly loss of income on these nineteen (19) units is $12,004.20, which multiplied by 3 years equals $36,012.60

iii. One (1) unit (10 feet by 20 feet) at $90.95 per month times 12 months equals $1,091.40. The loss of income for this unit over a 3 year period is $3,274.20.

iv. The total of the above figures is $63,000.00. However, my client has applied a vacancy ratio of 10% which is the standard percentage used in the industry which brings the total amount of the loss of income to $56,700.00.

c. Estimated damages for the RV/Boat Storage Area include the following:

i. Thirty-one spaces at a monthly rate of $44.70 per month times 12 months equals $16,628.40. The loss of income for the space for a two-year period is $33,256.80.

ii. However, there is a vacancy ratio of 10%, which reduces the loss to $29,931.12.

WHEREFORE, Plaintiff requests judgment against Defendant for damages as well as other relief the Court deems proper including costs associated with this action.

COUNT II - NUISANCE

18. Plaintiff realleges and incorporates by reference the assertions made in paragraphs 1 through 10, and 12 through 15.

19. By the aforesaid actions, Defendant created a condition causing damage to Plaintiffs property and creating a danger of future damage. In light of the conditions thereby created, Defendant's use of its property cannot be considered lawful or reasonable, but rather constitutes a nuisance.

20. As a result of this nuisance, excessive and unnecessary quantities of water were diverted to the adjacent property, directly and proximately causing the damage to a portion of Plaintiffs storage facility, including buildings identified as M and N of Plaintiffs storage facility located closest to the Defendant's property, as well as the area where the boat/rv storage is located, to the extent that they must be rebuilt.

21. These damages include approximately $535,000.00 for the reconstruction of the units which includes design, engineering and permitting, general site conditions, site work, paving and demolition, and new building construction as well as other miscellaneous costs and overhead profit.

22. There is also the loss of income to the Plaintiff until the units are rebuilt which is estimated to be a little over $177,971.58, based upon loss of storage units in Building M and N, as well as the RV/Boat Storage Area, which calculations are set forth in subparagraphs (a), (b), and (c) below.

a. Estimated damages for Building M include the following:

i. Fifty-two (52) storage units (7 ½ feet by 10 feet). These units rent out for $47.05 per month. $47.05 x 52 = $2,446.60. The yearly loss of income on these fifty-two (52) units is $29,359.20 which multiplied by 3 years equals $88,077.60.

ii. One (1) unit (10 feet by 20 feet) at $90.95 per month times 12 months equals $1,091.40. The loss of income for this unit over a 3 year period is $3,274.20.

iii. Two (2) units (10 feet by 30 feet) at a monthly cost of $140.80 times 12 months equals $3,379.20. The loss of income for these units over a 3 year period is $10,137.60.

iv. The total of the above figures is

$101,489.40. However, my client has applied a vacancy ratio of 10%, which is the standard percentage used in the industry, which brings the total amount of the loss of income to $91,340.46.

b. Estimated damages for Building N include the following:

i. Fourteen (14) storage units (7 ½ feet by 10 feet). These units rent out for $47.05 per month. $47.05 x 14 = $658.70. The yearly loss of income on these fourteen (14) units is $7,904.40, which multiplied by 3 years equals $23,713.20.

ii. Nineteen (19) storage units (10 feet by 10 feet). These units rent out for $52.65 per month. $52.65 x 19 = $1,000.35. The yearly loss of income on these nineteen (19) units is $12,004.20, which multiplied by 3 years equals $36,012.60

iii. One (1) unit (10 feet by 20 feet) at $90.95 per month times 12 months equals $1,091.40. The loss of income for this unit over a 3 year period is $3,274.20.

iv. The total of the above figures is $63,000.00. However, my client has applied a vacancy ratio of 10% which is the standard percentage used in the industry which brings the total amount of the loss of income to $56,700.00.

c. Estimated damages for the RV/Boat Storage Area include the following:

i. Thirty-one spaces at a monthly rate of $44.70 per month times 12 months equals $16,628.40. The loss of income for the space for a two-year period is $33,256.80.

ii. However, there is a vacancy ratio of 10%, which reduces the loss to $29,931.12.

WHEREFORE, Plaintiff requests judgment against Defendant for damages as well as other relief the Court deems proper including costs associated with this action.

Respectfully submitted,

/S/

Karen E. Maller, Esq.
FBN 822035/SPN 1288740
Powell, Carney, Gross, Maller & Ramsay, P.A.
One Progress Plaza, Suite 1210
St. Petersburg, Florida 33701
727/898-9011 - 727/898-9014 (fax)
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to Daniel F. Molony, Esq., Shook, Hardy & Bacon L.L.P., 100 N. Tampa Street, Suite 2900, Tampa, Florida 33601-0898 via [X]☐U.S. Mail; [X]☐Facsimile; and/or ☐Hand Delivery this __[13th]___ day of September, 2009.

/S/
Karen E. Maller, Esq.

APPENDIX W

[Letterhead] MACTEC

November 10, 2003

Ms. B.J. Hicks
Wal-Mart Stores, Inc.
SWDC — Landscape Dept. 9379
2001 SE 10th Street
Bentonville, AR 72716 - 0550

Subject: Site Visit to Sam's Club'Store No. 6387
7001 Park Boulevard, Pinellas Park
Florida, 33781
Date of Site Visit: September *15,* 2003
MACTEC Project 6590-03-1306.0 1

Dear Ms. Hicks:

On the above referenced date I made a site visit to determine if there was a stormwater flooding issue causing damage to the neighboring property. The site is generally located in the northeast quadrant of the intersection of Park Boulevard and Belcher Road in Pinellas Park. Adjacent to the east property line of the Sam's Club is a public storage business. I met with the owner of the storage business, Mrs. Cara Kessler to discuss her concerns.

According to Mrs. Kessler, the problem has persisted for approximately 3 years, but has .just recently become serious. We toured several of the storage units adjacent to the Sam's Club east property line

(Storage Units N). These units have been closed due to water intrusion. The units that I saw, and photographed, all had water or evidence of water seeping in between the concrete slab on grade and the concrete block walls. The roofs had recently been replaced, and there were no visible signs of water coming through the roofs, except in one of the units. The floor slabs of each of these units are at about the same elevation of ground on the west side of the building, which is coincident with the east property line of Sam's Club.

There is also water coming up through cracks in the asphalt pavement in the public storage area. The public storage property has a large center area of grass which is used to store large boats, campers and RV's. The owner stated that the ground was so saturated that people can not walk to their units, and some were sinking into the ground.

The east side of the Sam's Club property has an asphalt drive which has curb and gutter along the east edge. There is an 8 to 10 foot grassed area between the curb line and the property line. This grassed area has been graded to form a vee bottom swale which drains from the north to the south. The elevation of the curb is approximately 3 feet above the finish floor slab elevation of the storage units. I walked along the swale and saw and photographed standing water and staining along the bottom of the block wall of the storage units.

It does not appear that the problem of water intrusion into the storage units is being caused from stormwater runoff from the Sam's Club. There is only a minor amount of water that drains through the swale (rainfall landing in swale). There are no observable pipes or flumes that convey surface water into the swale; the swale only drains the stormwater that falls into it. It is my opinion that the problem is a ground water problem. It is hard to tell specifically without further testing that the problem is or is not caused by the Sam's Club. Further study and testing will have to be done to design a solution. Aquagenix, the company that performs maintenance on the stormwater system for Sam's Club has suggested a perforated drain pipe system. if this is a ground water problem, it is my opinion that a simple perforated pipe system will not correct the problem, due to the volume of ground water.

We appreciate the opportunity to serve as your consultant on this project. Please contact us if you have any questions concerning this report.

Sincerely,
MACTEC ENGINEERING CONSULTING, INC.

/S/

Michael D. Harding, P.E.
Principal Engineer
Director of Land Development